RECEIVED
Feb 15 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions
The Honorable Steven H. John, Circuit Court Judge

Appellate Case No. 2021-001320

THE STATE,

Respondent,

v.

CLAYBON LEWIS ATWATER, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

1301 2nd Avenue
Conway, SC 29526
(843) 915-5460

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUE ON APPEAL

I. The DUI statute requires the State to record a DUI suspect being advised his Miranda rights, but this requirement may be excused depending on the circumstances of the investigation. The State produced a video showing the officer reading Atwater his rights, but because Atwater laid down in the police cruiser and ignored commands to sit upright, his upper body is not visible. Did the trial court err by refusing to dismiss the case, or by failing to redact the video when Atwater did not specifically request so based on the alleged failure to show Miranda?

STATEMENT OF THE CASE

On April 6, 2019, Appellant Claybon Atwater was involved in a traffic accident in which Atwater collided with a motorcycle carrying two passengers, David and Donna Schnell. (R.292-96, 320-21). Donna Schnell died as a result of the crash and David Schnell was seriously injured. After an on-scene investigation, Atwater was arrested for driving under suspension and taken to jail so that a breath test could be administered. Because the accident occurred on a busy highway, police administered field sobriety tests at the jail, and the breath test confirmed Atwater's blood-alcohol level was above the legal limit. (R.362-80).

An Horry County grand jury indicted Atwater for felony DUI resulting in death and felony DUI resulting in great bodily injury. He proceeded to jury trial before the Honorable Steven H. John, circuit court judge. Atwater moved to dismiss the case in a pretrial hearing, arguing the State did not comply with the DUI video-recording statute, S.C. Code Ann. § 56-5-2953. (R.102-30). Judge John denied the motion and Atwater proceeded to jury trial. (R.130-32). He was convicted as charged on both counts and sentenced to concurrent terms of 22 and 15 years' incarceration, respectively. In this direct appeal, Atwater argues the trial court erred by refusing to dismiss the case based on the alleged failure of the video to show him being advised of his Miranda rights. He argues in the alternative that the trial court should have redacted the video.

STANDARD OF REVIEW

A question of statutory interpretation is a question of law, which is subject to de novo review and which the appellate court is free to decide without deference to the courts below. State v. Taylor, 436 S.C. 28, 34, 870 S.E.2d 168, 171 (2022), reh'g denied (Apr. 5, 2022).

ARGUMENT

I. The trial court correctly held the State produced a video that complied with the DUI statute's requirement that it "show" a DUI suspect being advised of Miranda warnings. Even if the video did not comply, nonconformity is excusable given the circumstances of the arrest.

The trial court correctly held the video produced in this case complies with the statutory requirement that it "show" a defendant being advised his Miranda rights because Atwater was partially visible throughout the recitation of warnings. Furthermore, any defect in the video is excusable because the investigation took place in the context of a deadly traffic accident, officers were forced to use body-worn cameras to record Atwater's conduct, and Atwater's own drunken conduct caused him to partially leave the frame. Even if the video did not conform to statutory requirements, dismissal is not the proper remedy and Atwater's alternative argument that the trial court should have redacted the video is not preserved for review. Finally, even if Atwater's redaction argument is preserved, he cannot show prejudice because his statements on the video are cumulative to his other properly-admitted statements. This Court should affirm.

A. The video complies with the DUI statute because it "shows" the administration of Miranda warnings.

The video produced in this case complies with statute because it visually shows Atwater being advised of his Miranda rights. See Miranda v. Arizona, 384 U.S. 436 (1966) (requiring police to warn suspects of rights to counsel and against self-incrimination before custodial interrogation). The South Carolina statute controlling investigatory procedure in DUI cases provides that police must video-

record DUI investigations. A DUI suspect "must have his conduct at the incident site and the breath test site video recorded." S.C. Code Ann. § 56-5-2953 (A). The recording at the incident site must "show the person being advised of his Miranda rights." S.C. Code Ann. § 56-5-2953 (A)(1)(a)(iii). The Supreme Court explained in State v. Taylor 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." State v. Taylor, 436 S.C. 28, 35, 870 S.E.2d 168, 172 (2022), reh'g denied (Apr. 5, 2022).

Atwater asserts the video in this case "did not visually depict Appellant or the officer during the provision of Miranda warnings . . . ." Brief of Appellant at 4. This is inaccurate. At least part of Atwater's body can be seen throughout Officer Floyd's reading of Miranda warnings in Floyd's body-worn camera video, State's Exhibit #1.[1] While Atwater's entire body is not visible, his lower half can be seen during the entire recitation of the warnings. Atwater's head can be seen just prior to the officer's initiation of the warnings, when Officer Floyd informs Atwater he is about to read him his rights. Immediately thereafter, Atwater lays down as the officer begins reading the warnings, causing his upper half to leave the frame.

---

[1] While Atwater refers at times in his brief to Atwater's conduct on Officer Shick's body-cam footage, Officer Floyd was the arresting officer in this case, and the officer who was required by statute to read Atwater his Miranda warnings. See S.C. Code Ann. § 56-5-2953 (providing "the failure **by the arresting officer** to produce the video recordings required by this section is not alone a ground for dismissal.") (emphasis added); see also State v. Landis, 362 S.C. 97, 104, 606 S.E.2d 503, 506 (Ct. App. 2004) (defining "arresting officer" as the officer who brings a person into custody).

Nonetheless, Atwater's head can be seen immediately before and after the officer recites the warnings, and at least part of his body can be seen the entire time. Accordingly, the video "visually confirms" that Atwater was present when Officer Floyd read the Miranda warnings. See Taylor, 436 S.C. at 35, 870 S.E.2d at 172. The video was sufficient to "show" the reading of Miranda warnings.

This case is factually distinguishable from State v. Taylor. In that case, the State produced a video where a DUI suspect was completely omitted from view during the reading of Miranda warnings. Taylor, 436 S.C. at 32, 870 S.E.2d at 170 (explaining the officer "did not activate his in-car camera. As a result, both [officer] and Taylor can be heard, but neither of them can be seen"). The Supreme Court held that the video did not comply with the DUI statute's requirement that the video "show" a suspect being advised of his Miranda rights.

Atwater's argument—though he does not clearly state it—is apparently that the video must show a suspect's entire body during the entire video. This would lead to an absurd result. Rarely will a suspect's entire body be visible throughout the reading of Miranda warnings, and this is not necessary to fulfill the statute's purpose of eliminating "swearing contests" between police and defendants. See State v. Kinard, 427 S.C. 367, 372, 831 S.E.2d 138, 140 (Ct. App. 2019). No rational person could view this video and have any doubt that the person depicted is Atwater. Atwater does not claim that he is not the person depicted in the video. At least part of his body can be seen throughout the reading of the warnings, and his

face can be seen immediately before and after the officer gives the warnings. The purpose of the statute is satisfied.

Beyond this formalistic argument, practical considerations should inform this court's interpretation of the statute's requirement that the video "show" the suspect being advised his Miranda warnings. Officers do not have monitors to see what is being captured on their body-worn cameras in real time. Furthermore, officers cannot be expected to flawlessly manipulate their body cameras while carrying out other duties to ensure a suspect's entire body is visible. Officers typically use written prompts to ensure they correctly and fully read a suspect his Miranda warnings, meaning they will only have one hand available. It would be farcical and dangerous to expect them to position themselves or otherwise manipulate the body-worn camera so that a drunken suspect's entire body is visible during the entire reading of rights in every case. Under Atwater's argument, a suspect can get his DUI charge dismissed by simply moving his body so that part of it is removed from the frame during the reading of rights. Surely the legislature did not intend to create a video requirement that can be so easily defeated.

Because at least part of Atwater's body can be seen throughout the video, it meets the statutory requirement that it "show" a suspect being advised of his Miranda warnings. This Court should affirm the trial court's refusal to dismiss the charge on this basis.

B. Even if the video does not "show" the Miranda warnings, the nonconformity is excusable due the totality of the circumstances of Atwater's arrest.

Even if this Court finds the video does not comply with the statute, compliance is excusable due to the circumstances surrounding this investigation. The trial court properly considered the "totality of the circumstances" surrounding Atwater's arrest, including the fact that this investigation took place at the scene of a deadly automobile accident. The statute provides that "[n]othing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances . . . ." S.C. Code Ann. § 56-5-2953 (B). Atwater claims this exception does not apply because "it was practicable to record in these circumstances." This argument is meritless.

A video exists, and therefore the provision related to total failure to produce a video is not relevant here. Even if the video did not fully conform with the statute, the non-conformance should be excused because Atwater's intoxication and his refusal to sit upright in the police cruiser are circumstances that explain and excuse the fact that his entire body is not visible during the reading of Miranda warnings. It was Atwater's drunken conduct that caused part of his body to leave the video frame, despite the officer's best efforts to capture his conduct. See State v. Kinard, 427 S.C. 367, 377, 831 S.E.2d 138, 143 (Ct. App. 2019) (holding "totality of the circumstances" excused non-conforming video due to suspect's "own conduct" where officers did not read Miranda rights on camera due to suspect's belligerence).

Furthermore, the investigation must be viewed in context as an accident investigation. This was not a run-of-the-mill DUI arrest where an officer

administers field sobriety tests after a routine traffic stop. Due to the presence of numerous law enforcement and medical personnel, heavy traffic, and the victim's dead body, and the danger that Atwater might attempt to flee, officers could not record the investigation on their dash-mounted cameras. (R.119-120). Instead, they were limited to recording their interactions with Atwater on their body-worn cameras. These circumstances fundamentally altered the officers' ability to record their investigation as they normally would, and explain their difficulty in meeting the statutory video requirements controlling a typical DUI arrest. Under these circumstances, exacting compliance should be excused. Atwater's assertion that the traffic accident did not affect officers' ability to record is at odds with the reality of this case.

Atwater argues nonconformity with the statute cannot be excused under the "traffic accident" exception because "there was video footage recorded." Brief of Appellant at 13. He asserts this exception only applies when no video is recorded at all. There is no support for this assertion in the statute or case law. The statute provides that in "circumstances including, but not limited to . . . traffic accident investigations . . . where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal." S.C. Code Ann. § 56-5-2953. Accordingly, the statute provides that the traffic accident exception applies when the state does not produce a video "required by this section," i.e. a video that conforms with each requirement. S.C. Code Ann. §

56-5-2953. A non-conforming video may be excused just as a non-existent video may. See State v. Kinard, 427 S.C. 367, 375, 831 S.E.2d 138, 142 (Ct. App. 2019) (holding subsection (B) exceptions apply to a video that does not conform to the requirements of subsection (A)); see also Taylor, 436 S.C. at 36, 870 S.E.2d at 172 n. 4 ("The video requirement may still be excused altogether if the provisions of subsection 56-5-2953(B) apply. The suppression of tainted evidence does not apply to circumstances falling within the parameters of subsection (B).)."

Even if the video did not meet the requirements of the statute, non-conformity should be excused due to the circumstances in which the investigation took place. This Court should affirm.

C. Even if the video does not meet statutory requirements, dismissal is not the proper remedy.

Atwater argued at trial that the alleged defect in the video required the trial court to dismiss the charge outright. He continues this argument on appeal, despite the fact that the Supreme Court unambiguously rejected the same argument in State v. Taylor, 436 S.C. at 36, 870 S.E.2d at 172 ("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. However, just as is proper when there is a Miranda violation in any other kind of case, suppression of tainted evidence—not per se dismissal of the DUI charge—is the proper remedy.").

Atwater attempts to skirt the holding of Taylor by arguing that this Court should ignore its holding and dismiss the case because that was the "law at the

time." Brief of Appellant at 12. This argument is meritless. The law in effect before Taylor was not that dismissal was the proper remedy for a non-conforming video. In fact, case law stated the opposite. For example, in State v. Gordon, 414 S.C. 94, 777 S.E.2d 376 (2015), the defendant alleged the video of a field sobriety test was of such poor quality that it failed to meet the statutory requirement that it "show" his conduct. The Supreme Court rejected the argument, holding the video was sufficient and explaining that "[e]ven 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." Gordon, 414 S.C. at 100, 777 S.E.2d at 379; see also State v. Sawyer, 409 S.C. 475, 480, 763 S.E.2d 183, 186 (2014) (holding that silent video did not conform with statute, but proper remedy was suppression). The Taylor court went so far as to call Atwater's argument—that dismissal was the proper remedy for a video that does not visually depict Miranda warnings—"absurd." Taylor, 436 S.C. at 38, 870 S.E.2d at 173.

Atwater erroneously cites to City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007), Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011), State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011), and State v. Elwell, 403 S.C. 606, 743 S.E.2d 802 (2013), to support his claim. These cases are distinguishable because each considered the complete absence of video, not video with alleged defects such that it did not "show" the defendant's conduct. See

Roberts, 393 S.C. at 336, 713 S.E.2d at 280 (no video of traffic stop, field sobriety tests, or arrest); Suchenski, 374 S.C. at 14, 646 S.E.2d at 879 (no video of one field sobriety test or arrest); Elwell, 403 S.C. at 614, 743 S.E.2d at 807 (explaining in dicta that total failure to record breath test would result in dismissal).

In Johnson, the arresting officer did not record the administration of the breath test. Because no video existed, the State was required by statute to submit an affidavit explaining why it was not able to record the test. Because the State did not do so as required by statute, failure to produce a video could not be excused. By contrast, the State is not required to submit an affidavit when a video is merely flawed or omits some action required by statute such that the omission may be excused under the accident and "totality of the circumstances" exceptions. Johnson, 396 S.C. at 189, 720 S.E.2d at 520; see also State v. Kinard, 427 S.C. 367, 375, 831 S.E.2d 138, 142 (Ct. App. 2019) (explaining "an affidavit is not needed to qualify for the third and fourth exceptions") (citing Teamer v. State, 416 S.C. 171, 177, 786 S.E.2d 109, 112 (2016)). Atwater ignores the distinction between these two types of cases.

Even if the video did not meet statutory requirements, dismissal was not the proper remedy. This Court should affirm the trial court's refusal to dismiss the case.

D. Atwater's argument that the trial court should have redacted the video because it does not "show" Miranda warnings is not preserved for review because he did not specifically argue this basis at trial.

Atwater's secondary argument that the trial court erred by failing to redact the video is not preserved for review because Atwater never specifically requested redaction of the video at trial as a remedy for the alleged failure to videotape Miranda warnings. When defense counsel did mention redaction, he did so in relation to the visual quality of the video. Atwater relied on State v. Gordon, 414 S.C. 94, 777 S.E.2d 376 (2015), a case where the Supreme Court addressed redaction as the proper remedy where a video recording of field sobriety tests is of such poor quality that it is more prejudicial than probative. Atwater had previously complained about the quality of the video, which at times was affected by skewed color and a distorted picture. (R.127). Atwater did not clearly argue that his statements should be redacted because of the alleged failure to "show" Miranda warnings, and did not identify any statements to be redacted. (R.127-128).

In its ruling, the trial court noted "the issue about quality," but never specifically refused to redact the video due to the alleged defect in the video recording of Miranda warnings. (R.131-32). The court concluded its ruling by stating that it would not dismiss the charge. (R.132). Accordingly, the redaction argument is not preserved for review because it was not specifically raised and ruled on by the trial court. See State v. Hopkins, 431 S.C. 560, 569, 848 S.E.2d 368, 372 (Ct. App. 2020) ("[T]o preserve for review an alleged error in admitting evidence[,] an objection should be sufficiently specific to bring into focus the precise

nature of the alleged error so it can be reasonably understood by the trial judge. The failure to raise specific grounds for an objection will not prevent the appellate court from addressing an issue when the record indicates that the trial court and the State understood the basis for the objection.") (internal citation omitted). Redaction of Officer Floyd's video is not preserved for review.

E. Even if Atwater's redaction argument is preserved, Atwater was not prejudiced because his statements at the scene are cumulative to his later statements given after video-recorded Miranda warnings and to other witness statements.

Even if this Court finds Atwater's argument for redaction preserved, Atwater's custodial statements at the scene were cumulative to other statements he made when not in custody, to other witness statements, and his own subsequent post-Miranda statements, and therefore Atwater suffered no prejudice. Even if the trial court had ordered redaction of the incident site statements, the same information would have come into evidence by other means. This Court should affirm.

As an initial matter, the statements made to Officer Shick prior to the point when Atwater was detained were not made in response to custodial interrogation, and therefore are not grounds for suppression under Taylor. See Taylor, 436 S.C. 28, 36, 870 S.E.2d 168, 172 (explaining "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") (emphasis added). Officer Shick specifically informed Atwater he was not under arrest.

Officer Shick did eventually detain Atwater, but did not question him further before again administering Miranda warnings, although Atwater is not visible on Officer Shick's body-cam video during this interaction. Atwater had originally denied he was driving. This time, Atwater admitted he was driving. However, Atwater did not object when Officer Shick's body-cam video was offered at trial. (R.301). Accordingly, he failed to preserve any argument related to redaction of statements contained in Officer Shick's video. State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009) ("Generally, a motion in limine is not a final determination; a contemporaneous objection must be made when the evidence is introduced.").

Atwater admitted he was driving to Officer Floyd at the incident site. However, Atwater's statement admitting he was driving is cumulative to his wife's statement, a neutral witness statement, and Atwater's own subsequent statement admitting he was driving, which he made in the datamaster room after being advised of his Miranda rights for the fourth time. (State's Exhibit #28 at 3:45, State's Exhibit #36 at 3:00 and 9:50; R. 168). Atwater did not contest at trial that he was the driver.

Atwater also admitted to Officer Floyd at the scene that he had been drinking "way earlier" in the day. (State's Exhibit #1 at 3:30). However, Atwater makes the same admission in the datamaster room. (State's Exhibit #36 at 12:30). Additionally, Atwater admitted to an insurance investigator that he had been drinking that day, and this statement was admitted at trial. (R.278). Accordingly,

Atwater's incriminating statements at the scene are cumulative to his subsequent statements.

Because the Supreme Court indicated in Taylor that it will analyze deficiencies in the recording of Miranda warnings required by the DUI statute in accordance with Miranda jurisprudence, the video-recorded Miranda warnings given in the datamaster room cure any prior Miranda violation and render the subsequent statements admissible. See Oregon v. Elstad, 470 U.S. 298, 309 (1985) (holding that a "subsequent voluntary and informed waiver" of Miranda may render the later statements admissible even if original voluntary statements were tainted by Miranda violation). Atwater was advised of his Miranda rights at the incident site three times, and all of his statements were plainly voluntary. Accordingly, his later statements were admissible under Elstad. In any case, Atwater waived any objection to the admission of his subsequent statements because he did not object when they were offered at trial, and does not challenge their admission on appeal.

Because his statements at the incident site are cumulative to these subsequent statements, Atwater was not prejudiced. See State v. Mizell, 332 S.C. 273, 504 S.E.2d 338 (Ct.App.1998) (in order to obtain new trial based upon erroneous admission of evidence, appellant must demonstrate both error and prejudice); State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008) ("The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence."). This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

BY:_____
Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 15, 2023

RECEIVED
Feb 15 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of General Sessions
The Steven H. John, Circuit Court Judge

Appellate Case No. 2021-001320

THE STATE,

Respondent,

v.

CLAYBON LEWIS ATWATER, JR.,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent 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."

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

1301 2nd Avenue
Conway, SC 29526
(843) 915-5460

By: _____

Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 743-3727

ATTORNEYS FOR RESPONDENT

February 15, 2023