

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Aiken County
The Honorable Clifton B. Newman, Circuit Court Judge
Appellate Case Number 2023-000972

RECEIVED

Aug 21 2023

S.C. SUPREME COURT

The State,

Petitioner,

vs.

Herbert E. Pray, III,

Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

ROBERT I. SUSSMAN
S.C. Bar No. 101384
347 Greene Street
Augusta, GA 30901
(706) 724-3331

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....5

 I. The Court of Appeals did not err in affirming the Magistrate Court’s finding that the officer’s reading of Respondent’s Miranda rights after the officer departed the location of encounter, after field sobriety tests, and after arrest violated the requirements of what must be included on “The video recording at the incident site” as stated in section 56-5-2953(A) of the South Carolina Code.

CONCLUSION.....9

STATEMENT OF QUESTIONS PRESENTED

- I. The Circuit Court did not err in affirming the Magistrate Court's finding that the officer's reading of Respondent's Miranda rights after the officer departed the location of encounter, after field sobriety tests, and after arrest violated the requirements of what must be included on "The video recording at the incident site" as stated in section 56-5-2953(A) of the South Carolina Code.

STATEMENT OF THE CASE

Procedural History

On January 1, 2019, Respondent was arrested for driving under the influence (DUI). Respondent was issued a Uniform Traffic Ticket. (UTT; App. 114). Respondent filed a Motion to Dismiss his DUI charge in Magistrate Court on March 8, 2019, and asserted that the State failed to comply with the video statute, section 56-5-2953(A) of the South Carolina Code, by not reading Respondent his Miranda rights at the “incident site”. (Motion to Dismiss; App. 14). The State filed a Response on March 12, 2019. (State’s Response to Defendant’s Motion; App. 16).

On March 12, 2019, the Magistrate Court held a hearing on the Motion to Dismiss. Both parties stipulated at the hearing that the arresting trooper responded to a call at a particular address, where the trooper located Respondent, had Respondent perform field sobriety tests, arrested Respondent, and inventoried Respondent’s vehicle, all video recorded and at the same location. (Transcript of Magistrate Court Hearing; Magistrate’s Return; App. 18). The parties further stipulated that the arresting officer read Respondent his Miranda rights on video, but in the officer’s moving vehicle, after departing the location above. (Transcript of Magistrate Court Hearing; Magistrate’s Return; App. 18). The Magistrate dismissed the case based on a violation of the video recording statute. (Transcript of Magistrate Court Hearing; Magistrate’s Return; App. 18).

On March 21, 2019, the State appealed the ruling to the Circuit Court. (Notice of Appeal and Appeal from Magistrate Court; App. 32). The Magistrate filed her Return on March 25, 2019. (Magistrate’s Return; App. 9). The Circuit Court held hearings on June 11 and 13, 2019. On August 9, 2019, the Circuit Court issued an order affirming the dismissal by the Magistrate. (Order on Appeal; App. 3).

The State served its Notice of Appeal on August 16, 2019. After briefing, the Court of Appeals affirmed the magistrate court's dismissal of the case. State v. Pray, Op. No. 2023-UP-067 (S.C. Ct. App. Filed February 22, 2023). The Court denied the State's Petition for Rehearing on May 18, 2023.

Factual Background

Trooper Singletary responded to a call at a residential address. When the trooper arrived at that address, he made his first contact with Respondent. (Dash Camera Video). After discussion with Respondent, the trooper administered field sobriety test on Respondent. (Dash Camera Video). As stipulated at the Magistrate Court hearing, Respondent was placed under arrest 22 minutes and 50 seconds into the Dash Camera Video, but Respondent was not read his Miranda rights at that time. (Dash Camera Video). Once Respondent was placed under arrest, Trooper Singletary questioned Respondent regarding his preference of a towing company and whether Respondent had been previously arrested for DUI, eliciting verbal responses from Respondent. (Dash Camera Video). All the above was captured on the trooper's forward-facing dash camera.

At approximately 27 minutes and 50 seconds into the video, Respondent was placed in the front seat of the trooper's patrol car. (Dash Camera Video) At this point, Respondent was being video and audio recorded by the trooper's rear-facing dash camera, which had been turned on to record contemporaneously with the forward-facing dash camera. (Dash Camera Video). At 28 minutes and 19 seconds into the video, prior to searching Respondent's vehicle, the trooper questioned Respondent if there was anything illegal in Respondent's vehicle, including open containers or drugs, and Respondent gave verbal responses to this questioning. (Dash Camera Video).

The trooper proceeded to search Respondent's vehicle. (Dash Camera Video) After he discovered what he believed to be an open container of wine, the trooper questioned Respondent as to the contents of the container, eliciting further verbal response from Respondent. (Dash Camera Video). At 39 minutes into the Dash Camera Video, and approximately 16 minutes and 10 seconds after Respondent was placed under arrest, the trooper departed the location where everything described above occurred. (Dash Camera Video).

While in the trooper's moving vehicle, Respondent continued to have conversation with the trooper, with the dash camera still recording. (Dash Camera Video). 40 minutes and 49 seconds into the video, Respondent asked the trooper if he was being arrested, which prompted and reminded the trooper to read the Respondent his Miranda rights, for the first time during the entire interaction. (Dash Camera Video). The trooper then read Respondent his Miranda rights at 40 minutes and 54 seconds into the video, after almost two minutes of driving away from the incident site, more than 18 minutes after Respondent was arrested, and after asking Respondent numerous questions both specifically about the allegation of DUI as well as other, general questions. (Dash Camera Video).

ARGUMENT

- I. **The Court of Appeals did not err in affirming the Magistrate Court’s finding that the officer’s reading of Respondent’s Miranda rights after the officer departed the location of encounter, after field sobriety tests, and after arrest violated the requirements of what must be included on “The video recording at the incident site” as stated in section 56-5-2953(A) of the South Carolina Code.**

The Court of Appeals correctly affirmed the Magistrate Court’s finding that the video in this case did not comply with the requirements of section 56-5-2953(A) of the South Carolina Code. The Court of Appeals properly analyzed relevant case law, the clear legislative intent behind the video recording statute of Section 56-5-2953 of the South Carolina Code, and the underlying facts and circumstances of this case in rendering an opinion that leads to the only logical result. Therefore, this Court should deny the Petition for Writ of Certiorari.

Pursuant to section 56-5-2953, a person charged with driving under the influence must have his conduct at the incident site and breath test site recorded as follows:

Section 56-5-2953. **Incident site and breath test site** video recording.

(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.

(1)(a) The video recording **at the incident site** must:

(i) not begin later than the activation of the officer’s blue lights;

(ii) include any field sobriety tests administered; and

(iii) **include the arrest of a person** for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, **and show the person being advised of his Miranda rights....**

S.C. Code Ann. § 56-5-2953(A) (Supp. 2014) (emphasis added).

“The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.” Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009); Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). In doing so, we must give the words found in the statute their “plain and ordinary meaning without resort to subtle or forced

construction to limit or expand the statute's operation." Sloan, 371 S.C. at 499. Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Gay v. Ariail, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009). "When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant." Town of Mt. Pleasant v. Roberts, 393 S.C. at 342. Criminal statutes must be strictly construed against the State and in favor of the defendant. State v. Castineria, 341 S.C. 619, 625-26 (Ct. App. 2000).

The Court of Appeals has determined that section 56-5-2953 serves two primary purposes. One of those two primary purposes, which is relevant to the case at hand, is to protect the rights of the defendant by "requiring video recording of the person's arrest and of the officer issuing Miranda warnings." State v. Taylor, 411 S.C. 294, 306, 768 S.E.2d 71, 77 (Ct. App. 2014). Since this case involves when and where Miranda rights were administered to Respondent, this purpose of protecting the defendant's rights is clearly the one that should be focused on.

Instead, Petitioner argues that this Court should concentrate on the other legislative purpose behind section 56-5-2953, which is "...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). It was never alleged in this case that any of the field sobriety tests were not adequately recorded, so the legislative purpose of preserving DUI evidence and preventing "swearing contests" is not directly implicated.

This Court should find that, in light of the legislative intent, the term "incident site" dictates where the actions listed in 56-5-2953 (A)(1)(a) must occur. Ensuring that

Miranda rights are administered, on video, and as soon as possible once an individual is placed under arrest for DUI protects the rights of that individual. Allowing Miranda to be read at some distant time, after arrest, with the defendant in custody and meanwhile being video recorded and potentially providing incriminating evidence of *being under the influence* through their speech, enunciation, demeanor, and responses to direct questioning from the arresting officer has a detrimental effect on protecting the rights of the defendant.

Petitioner next argues that an absurd result arises by the Court of Appeal's interpretation of the term "incident site." Petitioner gives a hypothetical example involving a driver wandering down the street three or four houses away while being pursued by the arresting officer, after field sobriety tests were administered. However, the Legislature has addressed the possibility of a driver or a particular circumstance making it impossible for the State to comply with the video statute by including the exceptions described in subsection 56-5-2953(B). The Legislature drafted section 56-5-2953 of the South Carolina Code with the realities of DUI stops and investigations in mind. Sometimes, drivers are injured and need immediate medical treatment. Other times, the driver may purposefully obstruct the officer's investigation or make it impossible to comply with the video statute. There are broad exceptions included in 56-5-2953(B) that cover these hypothetical situations, but none of these exceptions apply to the case at hand and none were raised by Petitioner.

Accordingly, the Court of Appeals properly interpreted the term "incident site" in light of the legislative intent of section 56-5-2953. Respondent's rights were not adequately protected in this case as the Legislature intended for them to be when drafting section 56-5-2953. Respondent was already in custody and was then induced into potentially incriminating himself by being questioned not only specifically about an open container, but also generally about prior DUI

charges and towing preference by the trooper, all without a prior Miranda warning and all after departing the incident site.

Therefore, this Court should find that the reading of Miranda after departing the incident site, after arrest, and after beginning custodial questioning does not serve to protect the rights of the accused and therefore does not satisfy section 56-5-2953. Accordingly, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,



Robert I. Sussman

ROBERT I. SUSSMAN, P.C.
S.C. Bar No. 101384
347 Greene Street
Augusta, GA 30901
TEL: (706) 724-3331
FAX: (706) 724-3327
robert@sussman-law.com

ATTORNEY FOR RESPONDENT

August 21, 2023