

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

APPELLANT,

V.

PHILLIP WAYNE LOWERY,

RESPONDENT

APPELLATE CASE NO. 2022-000806

BRIEF OF RESPONDENT

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S.C. SUPREME COURT

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ISSUES PRESENTED

1.

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?

2.

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

COUNTER ISSUES PRESENTED

1.

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?

2.

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

Respondent was indicted by a Greenville County grand jury on June 5, 2018, for driving under the influence, not first offense. App. 152-153. He proceeded to trial before the Honorable Robin B. Stilwell and a jury on December 12, 2018. J. Max Gravlee represented respondent; Brann Fowler appeared on behalf of petitioner, the state. App. 4. After a two-day trial, the jury found respondent guilty. App. 144, ll. 1 – 8. Judge Stilwell sentenced respondent to two years' imprisonment.

The Court of Appeals reversed in State v. Lowery, 436 S.C. 349, 872 S.E.2d 197 (Ct. App. 2022). App. 200 - 208. Petitioner sought rehearing which was denied on May 18, 2022. App. 238.

Petitioner filed its petition for writ of certiorari on June 10, 2022. Respondent filed his return to this petition for writ of certiorari on July 11, 2022. This Court granted certiorari in its order dated August 10, 2023.

Petitioner then filed its brief of petitioner on August 29, 2023. This brief of respondent follows.

ARGUMENT

1.

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

In this DUI case, the state called two witnesses—both police officers— as witnesses. Because neither officer witnessed Respondent driving a vehicle, the state relied on respondent’s statement taken through custodial interrogation, without Miranda warnings to convict him.

During the Jackson v. Denno¹ 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.² App. 13, 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.

Q: Because he was not allowed to leave?

¹ 378 U.S. 368 (1964).

² These “App.” citations are the numbers at the bottom middle of the state’s appendix.

A: Correct.

App. 17, l. 24 – 18, l. 8. (emphasis added).

Vallin's dashcam footage, which became state's exhibit 1, was played for the judge during the pre-trial hearing. Blue lights were flashing during questioning. Some of the questions Vallin asked respondent, in an accusatory manner and displaying disbelief in the answers he was receiving were:

- So, what happened?
- You don't know?
- You don't remember any darn thing?
- So, how'd you get all the way down here with your tire like that?
- How'd you get all the way down here from Piedmont Road all the way down here with your tire like that?
- So, you didn't even know your tire was like that?
- I mean that's not like its just leaking, you're tire's tore up, you're pretty much riding on the rim?
- But you didn't know that?
- How much have you had to drink tonight?
- About three or four [beers]?
- Three or five or four or five?
- Five, ok.
- How big were they?
- What do mean like "regular like" – twelve ounce?

- Were you the only one in your car?³

Petitioner characterizes this as “[b]asic of questions of Lowery in an effort to ascertain who or what caused the initial traffic accident, during which Lowery volunteered his inculpatory statements.” Brief of Petitioner at 4. Respondent respectfully disagrees with this assessment, and much more importantly, the Court of Appeals did also. State v. Lowery 436 S.C. 349, 356-57 872 S.E.2d 197, 201 (Ct.App. 2022).

Vallin never told respondent he could leave the scene or that he had a right to terminate the interrogation. App. 18, ll. 16–18. In fact, as seen, Vallin confirmed respondent was not free to leave. Vallin believed there were three or four law enforcement county deputies already on the scene at the Spinx gas station when he arrived, and their blue lights were on. App. 16, ll. 8-18. The judge interjected: “I’ll take judicial notice that there was a substantial number of law enforcement officers there and blue lights were flashing.” App. 17, ll. 18-20.

Vallin admitted that respondent asked him if you could call someone, and Vallin told respondent he could not call anyone. App. 19, ll. 2-9. Vallin believed respondent had been involved “in this collision.” App. 19, ll. 10-14. Trooper Brandon McNeely admitted respondent asked to be allowed to go to the restroom. McNeely refused to allow respondent to use the restroom, and respondent urinated on himself. App. 75, ll. 15-24. App. 80, l. 19 – 81, l. 8.

When pressed on other details, Vallin had difficulty recalling specific facts.⁴ App. 62, l. 6-22; App. 66. l. 1 – 64, l. 3. He had been a Trooper for three years and worked about one hundred and fifty DUI cases. He said respondent “smelled of alcohol,” and he appeared to be

³ State’s Exhibits 1 and 2 were on file with the Court of Appeals and they are on file with this Court for viewing.

⁴ Vallin admitted he did prepare an incident report in this case, and he did not have notes either. He also did not take any photographs. App. 65, ll. 6-12.

slurring his speech on the video. App. 63, ll. 12-16. In fact, Vallin appeared annoyed at times on the video with his inability to understand respondent.

Trooper Brandon McNeely was the state's only other witness. Like Vallin, he arrived at the gas station parking lot on January 26, 2018. App. 68, ll. 8-10. McNeely said respondent smelled of alcohol, and he demonstrated signs of impairment. App. 69, ll. 2-9. McNeely offered that on the HGN test respondent was "swaying or moving" which was a sign of impairment. App. 74, l. 8 – 77, l. 10. McNeely arrested respondent. The solicitor then noted that "[w]e didn't finish that video, but you said you Mirandized him, correct? McNeely said, "Yes, sir," and he said "Miranda" was on the video even though the judge nor the jury ever saw it. App. 78, ll. 2-6. On the dashcam on the ride to the jail, respondent repeatedly denied he was driving that evening. State's exhibit 2 which is on file with this Court.

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. App. 82, ll. 8-10.

Respondent moved for a directed verdict on the grounds that the state failed to prove the *corpus delicti* in the case. He argued that neither trooper witnessed respondent driving the red SUV, that there was no testimony regarding scrape marks or the temperature of the car. There was no proof respondent had been driving. App. 86, l. 4 – 88, l. 20.

The assistant solicitor opined in response, that respondent's statement from the dashcam videos was "excellent evidence and certainly enough for a jury question as to whether or not he was driving." He said respondent told the Trooper that he left Wild Country, and "I pulled in here to change my tire. I turned in here to get something to eat. If I hit anybody. I'm sorry. I

guess I screwed up. I can't lie. Then at one point he says, I was the only person in the car.” App. 88, l. 23 – 89, l. 20.

All of this was upon questioning without or before any Miranda warnings, and before respondent was arrested as respondent challenged pre-trial. The trial judge denied respondent's motion for a directed verdict. App. 90, l. 16 – 91, l. 11.

Respondent testified in his defense. He admitted drinking that night but denied driving. He said his friend, Kim Pryor was driving. App. 96, l. 13 – 97, l. 13.

Kim Pryor acknowledged that respondent drank a lot that night but she was driving and not respondent. Kim did not drink, and she recalled that respondent's daughter called him and said she had a flat tire and was “at the Spinx station on Piedmont Highway.” Kim then drove respondent to the Spinx station and left him at his daughter's car in the Spinx parking lot. Kim did not see respondent's daughter, and “[w]hen I pulled out of the Spinx station, Wayne [Respondent] was standing on the passenger side door of his daughter's car. She wasn't there.” App. 106, l. 5 – 111, l. 13.

The defense then rested, and argued that neither the Miranda warnings nor the full “sobriety tests” were on the videotape in violation of the statute. App. 119, l. 22 – 120, l. 21. The judge ruled the state had “substantially complied with the requirements under the law.”⁵ App. 120, l. 22 – 121, l. 3.

In his closing argument, defense counsel Gravlee argued that the state had failed to prove that respondent was driving the car that night. The state's evidence was only two Troopers and

⁵ As argued infra in issue two, this was the first opportunity for respondent to make a proper motion for relief since the solicitor also apparently expected that law enforcement would produce a video of respondent being given Miranda warnings and the full sobriety tests which would be shown to the jury during the state's case-in-chief. The failure of the state to do so was unexpected to the trial judge, the defense, and the solicitor.

neither could testify respondent was driving the car, or even that the car was warm to indicate it had recently been driven. Respondent, counsel reminded the jury, had been drinking that night and he said a “lot of things.” App. 130, l. 19 – 131, l. 15.

Respondent was found guilty as indicted. App. 147, ll. 1–8. Judge Stilwell sentenced him to two years’ incarceration, and imposed a fine of \$2,100. App. 153, ll. 6–10.

At the Court of Appeals, respondent 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. State’s Brief at 9. The state relied on Berkemer v. McCarty, 468 U.S. 420 (1984) for the notion that traffic stops are not unduly coercive. Alternatively, the state sought to rely on the public safety exception. State’s brief at 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, but suppression of the defendant’s statement.

Petitioner's statements at his new trial were also suppressed given the opinion of the Court of Appeals on issue one since they were involuntarily given. See State v. Taylor, 426 S.C. 28, 870 S.E.2d 168 (2022).

Discussion

As seen, upon Trooper Vallin's accusatory questioning, respondent admitted that he drank five beers, and that no one else was in the car with him. Thus, Vallin had respondent stumble in admitting he had to be the driver, and that he legally should not have been driving.

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." "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 (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-incrimination. Miranda v. Arizona, 384 U.S. 436 (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).

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 S.E.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 (2010).

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.” Berkemer v. McCarty 468 U.S. 420, 434 (1984). 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.

“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 (1977)).

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).

Respondent’s freedom of action was curtailed to a “degree associated with formal arrest.” California v. Beheler, 463 U.S. 1121 (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 (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, 417 S.C. 18, 22, 787 S.E.2d 847, 849 (Ct. App. 2016), police officers witnessed Medley run a stop sign and speed away from a checkpoint while driving a motorcycle. The police chased Medley. 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.

The Court of Appeals held 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 from 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, 351 S.C. 83, 85, 567 S.E.2d 904, 905 (Ct. App. 2002), a Buick crashed into a victim and the driver left the accident scene. 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 said he had not had 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 exiting the house, in an effort to obtain incriminating information, *citing* State v. Kennedy, 333 S.C. 426, 43, 510 S.E.2d 714, 716 (2020).

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

In State v. Easler, 327 S.C. 121, 125, 489 S.E.2d 617, 620 (1997), *overruled on other grounds by* State v. Greene, 423 S.C. 263, 283, 814 S.E.2d 496, 507 (2018), a motor vehicle accident occurred around 2:15 in the afternoon. 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 admitted he had been in an accident 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],” and therefore modified the opinion of the Court of Appeals affirming in that case.

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.

In this case, respondent was flanked by a substantial number of police officers from at least three different agencies. The officers were in uniform and armed. Respondent was told he could not make a telephone call, he was not allowed to use the restroom when he told law enforcement he had 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, Trooper Vallin testified about a car accident on Piedmont Highway on January 26, 2018. App. 11, 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. App 11, ll. 8–15. Having not witnessed the accident or learned firsthand that respondent was in any way involved in the accident, Vallin nonetheless drove to the Spinx. App. 12, ll. 7–9. Flanked by either three or four other officers, Vallin questioned respondent. App. 12, l. 19 – 13, l. 2.

Vallin plainly and candidly testified that respondent's freedom was curtailed *immediately* when Vallin first walked up to him. App. 13, ll. 23–25; App. 17, l. 24 – 18, l. 8. Although not dispositive by any means, Vallin did not tell respondent that he could leave the scene or that he was free to terminate the interrogation. App. 18, ll. 16–21. The footage showed respondent

asking if he could make a telephone call; Vallin would not let him. App. 19, ll. 2–6.

Vallin radioed that respondent was “10-55” meaning “intoxicated driver.”⁶ State’s Exhibit 1 at 1:35–1:40, very specifically at 1:39 on the video. This further supported Vallin’s honest answer that respondent was not free to leave.

Defense counsel argued this was “a plain, clear custodial interrogation.” App. 21, l. 11 – 24, l. 4. In response, the state cited State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984), a case which is distinguishable from this case. App. 24, l. 6 – 25, l. 6.

In Morgan, the defendant had apparently been racing with another car, a Mustang, when the Mustang driver lost control and wrecked. Morgan returned to the scene. “The Defendant stated to three police officers that he had been using alcohol and marijuana and that he had been driving the Camaro before the wreck. He did not say that he was under the influence. Officers arrested him and charged him with driving under the influence of drugs or alcohol. He flunked a field sobriety test and later took a breathalyzer test which registered blood alcohol level at 0.13. This Court found that the admissions by the defendant in Morgan were made during the course of a routine investigation.” State v. Morgan, 282 S.C. 409, 411-12, 319 S.E.2d 335, 336-37 (1984).

The trial judge found “objectively that [respondent] was not in custody at the time.” App. 25, ll. 13–14.

⁶ “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_\(SC\)](https://wiki.radioreference.com/index.php/SC_Highway_Patrol/Department_of_Public_Safety_(SC)) (last accessed July 11, 2022).

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.

App. 25, 22, l. 14 – 26, l. 7.

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.

State v. Morgan, 282 S.C. at 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 respondent was the driver of the at-fault vehicle App. 11, l. 8 – 12, l. 18.. Respondent was not free to leave as soon as Vallin first walked up to him, perhaps sooner. App. 13, ll. 23–25. Again, the videotape showed Vallin questioned respondent in an accusatory manner. Officers approached respondent, he did not return to the scene of the wreck as in Morgan. Vallin was investigating who caused the collision. App. 14, ll. 1–4. Respondent admitted he drank five beers and confirmed he was the only one in the car that night. State's exhibit 1 at 1:00-1:18.

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, respondent 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 respondent was in custody. Vallin’s stark admission sets the scene for respondent, 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 respondent’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) as argued by defense counsel at trial, App. 24, I. 4, the Court of Appeals concluded respondent 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 201.⁷

The state's creative contentions regarding these factors are respectfully unsupported by the record. For example, the first factor, whether the contact with law enforcement was initiated by the police or the person interrogated. The facts indicate Vallin walked up to respondent. App 12, ll. 7–22. The state failed to offer any evidence as to whether respondent voluntarily agreed to interview. To the contrary, Vallin unambiguously testified he never advised respondent that he was free to leave or terminate the interrogation. App. 18, ll. 2–21. Morgan can be distinguished respondent's case based on this factor alone.

Secondly, the express purpose of the interview was to question respondent. The officers were seeking information. Vallin radioed that respondent 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. App. 13, l. 14 – 14., 4, 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 respondent how much he had to drink and how large the beers were. State's Exhibit 1. Based on the radio contact, he believed respondent was intoxicated. In accordance with that theory, law enforcement had respondent submit to sobriety tests.

The third factor—where the interview took place—weighs in favor of a custody

⁷ Citing George L. Blum, Annotation, What Constitutes "Custodial Interrogation" of Adult by Police Officer Within Rule of *Miranda v. Arizona* Requiring that Suspect Be Informed of Federal Constitutional Rights Before Custodial Interrogation—At Police Station or Sheriff's Office, Where Defendant Voluntarily Appears or Appears at Request of Law Enforcement Personnel, or Where Unspecified as to Circumstances Upon Which Defendant Is Present, 29 A.L.R.6th 1, § 2 (2007).

determination. Petitioner 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. Respondent was accosted by officers at a gas station, private property presumably owned by Spinx. Further, there were not just one or two officers. Blue lights were flashing in the background and state’s exhibits 1 and 2 both show this was no routine traffic stop. As such, this factor weighs in favor of a custody determination.

Fourth: whether the police informed the person he or she was under arrest or in custody.

This is likely a neutral factor—although Vallin would have obstructed respondent had he attempted to leave, the police did not verbally inform respondent he was under arrest or custody, at least until later. The fact remains, a person in respondent’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 respondent of this, because respondent was not free to leave. Further, state’s exhibits 1 & 2 show a strong police presence where no ordinary citizen would have felt he could have turned his back on the police and walked away.

The sixth factor is whether there were restrictions on the person’s freedom of movement during the interview. The officers talking with respondent used body language and “social cues” to continually engage respondent. As such, he knew he was not free to leave. The denial of respondent’s request to use the bathroom and the refusal to allow him to use the telephone, should be considered in the analysis under the *totality of the circumstances*. If respondent thought he was free to leave, he wouldn’t have been asking for permission to perform these most basic functions of everyday life. See 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. App, 25, l. 7 – 26, l. 10. The state seeks to limit the custody period to six minutes based on Vallin’s interrogation, but the entirety of respondent’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.” App. 17, ll. 18–20. Again, 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. The state’s Exhibit reflects Vallin’s hunt for incriminating responses. Again, Vallin got respondent to admit under pressured peppering questioning that he drank at least five beers, and that he was the only one in the car – meaning he was driving. Although the questioning may have subsided after Vallin 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.” App. 11, ll. 10–15. According to the solicitor, there was a lot of discussion between respondent and the officers about the wreck. App. 26, ll. 13–18.

The eleventh factor is whether the police were aggressive, confrontational, or accusatory. Vallin clearly found it incredible that respondent said he had or could have driven the vehicle with a tire flat. He repeatedly asked respondent how he got to the gas station. Vallin was downright accusatory. He firmly believed respondent had driven to the gas station after causing the accident, and he was accusatory as a result. The fact that Troopers or police officers on other occasions may have been aggressive or confrontational does no change the fact that the tone of

Vallin's questioning at the pertinent time was not "conversational." In, Vallin's own testimony at the Jackson v. Denno hearing was that he became accusatory. App. 19, 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—respondent was arrested. The answers elicited through the custodial interrogation provided officers with enough information, in their minds, to arrest respondent:

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.

App. 19, ll. 18–22.

Based on the above, respondent was in custody at the time Trooper Vallin was asking questions designed to elicit a response. Trooper Vallin should have read his Miranda rights at this point. Because Trooper Vallin failed to do so, the statements should be suppressed. The Court of Appeals respectfully should be affirmed on this issue.

2.

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.

At the directed verdict stage, defense counsel noted, and it is undisputed, that the state could not produce a video of the Miranda warnings or the field sobriety tests in full as required by the statute. Thus, defense counsel asked the court to direct a verdict ending the case “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 in full and the administering of respondent’s Miranda rights. App. 119, l. 22 – 120, l. 14. The trial judge found that the state “substantially complied with the requirements under the law.” App. 120, ll. 22–24. The court ruled that “the video itself was introduced into evidence and ... that is the requirement.” App. 120, l. 22 – 121, l. 3.

The directed verdict stage was the first opportunity for respondent to make a motion for relief given the state’s failure to produce the videotape of the Miranda warnings, and the full field sobriety tests. Apparently the solicitor was surprised that law enforcement could not produce a functional videotape during his case-in-chief given his remarks in response to defense counsel’s motion for a directed verdict. App. 119, l. 22 – 120, l. 21.

Respondent was alleged to have driven under the influence, in violation of S.C. Code Ann. § 56-5-2930. App. 156. “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, and it could not produce any video of respondent being given Miranda warnings as required by the statute. App. 78, ll. 2–3. Petitioner argues “[n]owhere in the statute is there a requirement that the video must be shown to the trier of fact.” Brief of Petitioner at 15. However, even if this assertion were to carry the day, which respondent certainly does not concede, neither the trial judge nor the appellate courts in this case were able to observe the giving of Miranda warnings nor the full field sobriety tests. Therefore, the state failed to comply with the above statute; it did not prove that the video from the incident site contained the Miranda warnings nor the field sobriety tests in full. Showing only a part of a test a defendant performed is intuitively misleading and unfair where the statute requires that it “include any field sobriety tests administered” to be on the tape. See State v. Kinard, 427 S.C. 367, 372, 831 S.E.2d 138, 141-42. (Ct. App. 2019). “All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” State v. Sweat, 379 S.C. 367, 374, 665 S.E.2d 645, 649 (Ct.App. 2008).⁸

At the time of respondent’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.

⁸ Affirmed as modified in State v. Sweat, 386 S.C. 339, 688 S.E.2d 569 (2010).

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 respondent's case at the Court of Appeals, this Court issued State v. Taylor, 436 S.C. 28, 870 S.E.2d 168 (2022) which modified the remedy.

There could be no informed argument whether respondent heard and understood his Miranda rights in this case. The trial court respectfully abused his discretion in summarily finding that the video complied with the statutory requirements where neither the Miranda warnings nor the field sobriety tests were on the video.

The Court of Appeals correctly 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 cited State v. Kinard, 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 state in that case failed to capture the arrest and Miranda warnings on the videotape.

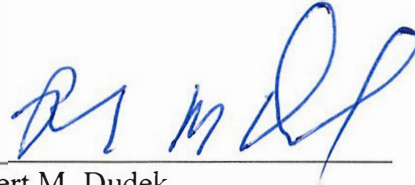
The Court of Appeals further stated "[g]iven our understanding of the legislative intent in section 56-5-2953(A), the requirement that the arrest and Miranda reading be videotaped serves to protect the rights of the defendant." Id. at 373, 831 S.E.2d at 141 (emphasis added).

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 "[p]ut a requirement on how the State prosecutes its case and presents its evidence and that is a decision for the prosecutor and not the judiciary." Brief of Petitioner at 15. Respectfully, there was no indication here that the solicitor made some strategic decision not to play Miranda warnings and the full field sobriety tests that he had available. The state simply failed to create a sufficient record to prove that it complied with the statute vis-à-vis the Miranda warnings and the field sobriety tests. The Court of Appeals therefore properly reversed, and the opinion of the Court of Appeals should be affirmed.

CONCLUSION

Based on the foregoing, respondent respectfully requests that this Court affirm the opinion of the Court of Appeals granting respondent a new trial.



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This 18th day of October, 2023.