STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal From Greenville County
Hon. G. Edward Welmaker, Circuit Court Judge
Appellate Case No. 2011-184986

The State,

Respondent,

v.

Gregg Gerald Henkel,

Appellant.

PETITION FOR REHEARING

On July 10, 2013, this Court reversed the trial court's decision admitting the videotape of the incident scene and not dismissing the case. This Court misapprehended or overlooked the plain meaning of the exceptions found in subsection B of section 56-5-2953 of the South Carolina Code. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the videotape admissible and met the requirements of section 56-5-2953, and affirm Appellant's conviction and sentence.

First, this case involves the investigation of a traffic accident and not a traffic stop for driving under the influence. As a result, the provisions of section 56-5-2953(B) are clearly implicated. The subsection provides:

> Further, in circumstances including, . . . traffic accident investigations, . . . where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for

> dismissal. However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section.

S.C. Code Ann. § 56-5-2953(B)(Supp. 2006).

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)). "The legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted).

The trial court properly found, and this Court agreed, the videotaping began as soon as practicable. The majority, however, maintains the officer must start over the requirements of subsection A which include the advisement of Miranda rights and the conducting of the field sobriety tests in order to properly conform with the provisions of the section as required. The majority's interpretation re-writes the requirements of subsection B of the statute. City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language.").

The statute is worded such that the phrase as soon as videotaping in practicable applies to both when the videotaping must "begin" and when it must "conform" to the requirements of the statute. The clear unambiguous reading is that the conformity must begin at that point, and, from that point forward, comply with the remaining videotaping requirements set forth in subsection A. The majority's reading of the statute leads to the absurd result that an officer, as in the case *sub judice*, must re-do actions already performed prior to the ability to practicably turn on the videotaping. See State v. Long, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005) ("The legislature is presumed to intend that its statutes accomplish something."); Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (finding courts will reject an interpretation of a statute leading to an absurd result clearly unintended by the legislature); State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011) ("The statute must be interpreted with realistic circumstances and rationales in mind.").

In this case, the officer provided the Miranda rights in the back of the ambulance while he was attempting to ascertain the extent of Appellant's injury and whether he intended to seek medical treatment. Upon learning he did not intend to seek medical treatment, the officer began the field sobriety tests as he was also initiating the camera by remote. There is no contention the officer failed to provide Miranda warnings, only that they were not recorded on camera. However, to require the officer to go back and redo the warnings once he is within range of his camera "effectively eviscerates" the exception as the dissent correctly points out. The exception should be read to require conformity to being as soon as practicable and the officer in this case met that requirement.

Further, the majority of this Court overlooked the remainder of the exceptions included in subsection B. The subsection also provides:

> Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances. . . .

S.C. Code Ann. § 56-5-2953(B) (2006). As the dissent correctly points out, and the majority fails to address, the totality of the circumstances indicate the officer reasonably complied with the requirements of the section.

This case began when an eyewitness saw Appellant swerving and "driving kind of crazy." (T.54; R. 40). The eyewitness dialed 911 to report the driver and stayed on the phone with 911 while watching the driver of the vehicle swerve and nearly hit other vehicles. (T.54-55; R. 40-41). Appellant hit a bridge, and flipped his vehicle. Appellant climbed out of the vehicle, ran across to the other side of the road, and jumped a fence attempting to flee the scene. (T.55; R. 41). The eyewitness relayed what she saw to 911, returned to the accident scene, and provided the information to the police when they arrived. (T.55; 57-58; R. 41; 43-44).

Sergeant Hiott with the South Carolina Highway Patrol arrived on scene of the overturned pickup truck. (T.75; R. 61). He talked to the eyewitness and she relayed the events to him. He proceeded to organize a group to search the area for Appellant and after about 20 minutes could not locate him. (T.76; 78; R. 62; 64). The accident occurred a little after 1:00am.

Sergeant Hiott later responded to a dispatch call indicating the possible driver of the overturned truck was located wandering the roadway on Interstate 385. The driver was in the back of an ambulance with the officer arrived. Sergeant Hiott arrived at a scene with multiple vehicles already there, including an ambulance. He pulled in front of all vehicles out of concern for being hit by oncoming traffic because he was only a semi-marked car and wanted to be in front of the other vehicles which had full lights. Further, he had to verify Appellant's condition, as well as make a determination of whether he believed Appellant was intoxicated, thus triggering consideration of the DUI statute. Sergeant Hiott got into the ambulance to talk with Appellant and the EMS. He testified when he got into the ambulance, he could smell the alcohol. (T.80; R. 66). Sergeant Hiott made the determination Appellant was intoxicated and was refusing medical treatment, provided appropriate Miranda warnings which have not been contested on appeal, triggered his camera, conducted the tests he believed were appropriate, and produced a videotape of Appellant's conduct which began as soon as practicable and included everything done at the site from that moment forward. Under the totality of the circumstances, the trial court properly admitted the videotape and refused to dismiss the case.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the trial court correctly admitted the videotape of the incident scene and properly refused to dismiss the case.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 24, 2013

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise, Esquire
305 Main Street
Greenwood, SC 29646

I further certify that all parties required by Rule to be served have been served.
This 24th day of July, 2013.

Ellen R. DuBois

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ALAN WILSON
ATTORNEY GENERAL

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SC Court of Appeals

July 24, 2013

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Gregg Gerald Henkel,
Appellate Case No. 2011-184986

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of the Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures
cc: C. Rauch Wise, Esquire (2 copies enclosed)
Victim's Services (enclosure)