THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5230 (S.C. Court of Appeals filed May 14, 2014)

THE STATE,

RESPONDENT,

V.

CHRISTOPHER LEE JOHNSON,

APPELLANT.

APPELLATE CASE NO. 2011-201808

PETITION FOR REHEARING

The Appellant, Christopher Lee Johnson, respectfully petitions the Court for a rehearing of its Opinion No. 5230 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

On May 14, 2014, this Court affirmed Appellant's conviction for driving under the influence (DUI), holding that the Trial Court did not err in denying his motion to dismiss the charge because the Greenville Police Department (GPD) failed to comply with the video recording requirements of S.C. CODE ANN. § 56-5-2953.

Appellant asserts that where Officer Lowe's marked patrol car, a vehicle used for traffic stops, was still not equipped with a video camera on March 18, 2010, the day of Appellant's DUI arrest, even though the statute requiring video recording at the incident site

was enacted in 1998, reversal of Appellant's DUI conviction is required. R. 16, l. 10 – 17, l. 9; 24, ll. 7-13.

In Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011), the South Carolina Supreme Court found, "Our appellate courts have strictly construed section 56-5-2953 [of the South Carolina Code] and found that a law enforcement agency's failure to comply with these provisions is fatal to the prosecution of a DUI case." See S.C. CODE ANN. § 56-5-2953 (2010). Subsection (A) of section 56-5-2953 provides in relevant part: A person who operates a vehicle while under the influence of alcohol "*must have his conduct at the incident site . . . video recorded* [and] . . . *[t]he video at the incident site must begin not later than the activation of the officer's blue lights*[.]" (emphasis added).

Subsection (B) of section 56-5-2953 outlines four exceptions that excuse noncompliance with subsection (A)'s mandatory video recording requirements. Specifically, a police department's failure to comply with the video recording requirement is excused when: (1) the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) the arresting officer submits a sworn affidavit that it was impossible to produce the video recording because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's arrests; or (4) for any other valid reason for the failure to produce the video recording based upon the totality of the circumstances. See § 56-5-2953(B).

Furthermore, subsection (G) of section 56-5-2953 provides in relevant part: "The provisions contained in Section 56-5-2953 (A), (B), and (C) take effect for each law

enforcement vehicle used for traffic enforcement once the law enforcement vehicle is equipped with a video recording device." Our Supreme Court, however, has held that police departments cannot "continually evade [their] duty [under subsection (A) of section 56-5-2953] by relying on subsection (G) of section 56-5-2953." Roberts, 393 S.C. at 347, 713 S.E.2d at 285. Thus, a police department's "failure to equip its patrol vehicles does not negate the application of the statutory exceptions in subsection (B)." Id.; see § 56-5-2953(B).

While Appellant recognizes that the GPD did eventually begin to undergo efforts to purchase videotaping devices, it submits that these efforts did not begin in a timely manner with respect to Appellant's arrest on March 18, 2010. A review of the timeline of the efforts or lack of efforts made by the GPD is instructive to determine whether the GPD had made sufficient attempts to comply with § 56-5-2953 at the time of Appellant's arrest on March 18, 2010:

1. On December 12, 2001, the GPD purchased around eighteen cameras which all failed almost immediately. [R. 28, ll. 1-13];

2. The GPD received 21 cameras from the Department of Public Safety [DPS] by the end of 2004. The majority of those cameras were eventually uninstalled. At the time of Appellant's arrest on March 18, 2010, approximately 8 of these cameras remained installed. [R. 31, ll. 16-20; 41, ll. 20-23; 73, ll. 1-11; 77, ll. 4-18];

3. In 2008, the GPD decided it only wanted digital cameras and not VHS cameras. [R. 43, ll. 8-14];

4. On April 28, 2009, DPS invited the GPD to request more video cameras. DPS advised in that letter that departments could request VHS systems or digital systems, but that digital system requests would be delayed until DPS fulfilled requests for VHS cameras. The letter from DPS stated that VHS systems would be "***awarded immediately***." The GPD decided not to request the VHS cameras, but only requested 20 digital cameras. [R. 62, 23 – 64, l. 14; 64, l. 25 – 65, l. 4; 66, l. 11 – 67, l. 2; 78, ll. 2-6; 99, l. 10 – 100, l. 4; 179 (emphasis added); 180]; and

5. The GPD's first purchase of digital cameras occurred on February 23, 2010, ***less than a month before Appellant's arrest on March 18, 2010.*** The GPD originally only purchased 13 cameras on February 23, 2010 and purchased another 76 cameras between September and December 2010, ***after Appellant's arrest.*** [R. 55, ll. 2-4; 76, ll. 9-13; 76, l. 14 – 77, l. 18; 182].

Therefore, for approximately 170 patrol cars in use by the GPD, the GPD decided to only request 20 digital cameras from DPS in 2009. The GPD also decided not to request any VHS cameras despite the letter from DPS stating that VHS systems would be "awarded immediately." R. 59, ll. 15-20; 179; 180. As far back as 2002, the GPD was considered high producing based on the total number of arrests and certainly should have at least made a request for the VHS cameras from DPS. R. 93, ll. 6-13.

This Court suggests that it does not matter whether the GPD made a request for VHS cameras or not since the Greenville Sheriff's Department did not receive its request for VHS cameras until after Appellant's arrest. An agency like the Greenville Sheriff's Department may have a valid reason for failing to equip a patrol vehicle with a video camera where it made the request for VHS cameras to DPS; the GPD, however, did not make any such request to DPS. Therefore, the GPD should not be able to rely on the Supreme Court's example of valid reason in the Roberts case – "that despite concerted efforts to request video cameras, it has not been supplied with the cameras from DPS." Roberts, 393 S.C. at 349, 713 S.E.2d at 287.

The GPD only began purchasing video cameras for its vehicles on February 23, 2010, less than one month before Appellant was arrested on March 18, 2010. On February 23, 2010, the GPD only purchased 13 video cameras. It then purchased another 76 cameras between September and December 2010, after Appellant's arrest. R. 182. At the time of Appellant's arrest, the GPD only had approximately 21 video cameras installed in its 170

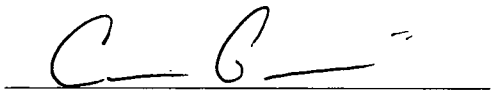
car fleet – the 13 cameras it purchased on February 23, 2010 and about 8 cameras that DPS had given them by the end of 2004. R. 77, ll. 4-18.

The efforts of the GPD to obtain the statutorily required video cameras came too late for Appellant who was arrested on March 18, 2010 by an officer whose marked patrol car did not comply with § 56-5-2953 by having a required video recording device. The GPD's failure to make a request from DPS for the immediately available VHS cameras and failure to begin purchasing efforts of video cameras prior to February 23, 2010 is not a valid reason for failing to comply with the video-recording requirements of § 56-5-2953 on the day of Appellant's arrest for DUI.

CONCLUSION

For the reasons set forth herein, Appellant Christopher Lee Johnson respectfully requests that the Opinion of the Court of Appeals be withdrawn, his conviction and sentence for DUI be reversed, and the case be dismissed pursuant to Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011).

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

This 28th day of May, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Christopher Johnson, at 203 Dobie Drive, Grier, SC 29651, this 28th day of May, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 28th day
of May, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.