

2014-DD1599

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
G. Edward Welmaker, Circuit Court Judge

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JUL 24 2014

Opinion No. 5230 (S.C. Ct. App. filed May 14, 2014)
10-GS-23-9683-84

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

CHRISTOPHER LEE JOHNSON,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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INDEX

INDEX 1

CERTIFICATION BY COUNSEL..... 2

QUESTION PRESENTED FOR REVIEW 3

STATEMENT OF THE CASE 4

STATEMENT OF FACTS..... 5

ARGUMENT

The Court of Appeals erred in affirming the Trial Court’s denial of
Petitioner’s motion to dismiss the DUI charge after the Greenville Police
Department failed to comply with the mandatory videotaping provisions of
S.C. CODE ANN. § 56-5-2953 (2010) and failed to provide a valid reason for
its willful violation of the video-recording requirements..... 9

CONCLUSION 14

CERTIFICATION BY COUNSEL

The Court of Appeals issued its decision on May 14, 2014. App. 1-9.
Counsel for Petitioner certifies that the petition for rehearing was made on May 28,
2014 and finally ruled on by the Court of Appeals on June 25, 2014. App. 10-17.

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming the Trial Court's denial of Petitioner's motion to dismiss the DUI charge after the Greenville Police Department failed to comply with the mandatory videotaping provisions of S.C. CODE ANN. § 56-5-2953 (2010) and failed to provide a valid reason for its willful violation of the video-recording requirements?

STATEMENT OF THE CASE

On April 12, 2011, Petitioner Christopher Lee Johnson was indicted by the Greenville County Grand Jury for driving under the influence ("DUI") and driving under suspension ("DUS"). R. 218 – 223.

On October 10, 2011, Petitioner proceeded to trial before the Honorable G. Edward Welmaker and a jury. R. 1. Petitioner was represented by Daniel J. Farnsworth, and the State was represented by Sara Lee Drawdy. R. 1.

On October 11, 2011, the jury found Petitioner guilty as charged. R. 158, ll. 12-23. The Trial Court sentenced Petitioner to one year imprisonment suspended upon the service of nine months on the DUI conviction and thirty days imprisonment on the DUS conviction. R. 166, ll. 1-18. The Trial Court gave Petitioner credit for serving two hundred and seventy-three days in pretrial detention and ordered Petitioner to serve fifteen months probation. R. 160, ll. 17-19; 166, ll. 1-6. The sentences were to run concurrently. R. 166, ll. 17-18.

On May 14, 2014, the South Carolina Court of Appeals affirmed Petitioner's DUI conviction and sentence. *State v. Johnson*, Opinion No. 5230 (S.C. Ct. App. filed May 14, 2014). App. 1-9. Petitioner subsequently filed a petition for rehearing on May 28, 2014. App. 10-16. The Court of Appeals issued an order denying the petition for rehearing on June 25, 2014. App. 17.

This petition for writ of certiorari to the Court of Appeals follows.

STATEMENT OF FACTS

Pre-trial, defense counsel moved to dismiss the DUI charge because the arresting officer's vehicle was not equipped with a video camera pursuant to section 56-5-2953 of the South Carolina Code.¹ R. 10, l. 19 – 13, l. 6. Defense counsel argued “that the facts in this case are very similar to the facts in [Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011)].” R. 13, ll. 14-15. Defense counsel noted, “And we have no argument with respect to th[e] . . . breath site test.” R. 14, ll. 8-11.

At the pre-trial hearing, Jesse Lowe of the Greenville Police Department (“GPD”) stated that on March 18, 2010, he was the arresting officer in this case and he was driving a “*marked patrol vehicle*.” R. 16, ll. 16-25 (emphasis added). Officer Lowe admitted that he signed an affidavit for failing to produce a videotape because “[his] *patrol car was not equipped with a video camera at the time of the incident*.” R. 17, ll. 10-23 (emphasis added); 167 (Court's Exhibit # 1). Officer Lowe then maintained,

I observed [Petitioner] back out of a parking space . . . within the city limits of Greenville, South Carolina with no lights on, headlights or tail-lights. I then . . . observed that one of his tail-lights was inoperable. And I also observed him stop at a red-light and then proceed through the intersection before the light had [turned] green and then again stop in the middle of the intersection.

R. 18, ll. 5-13.

¹ S.C. CODE ANN. § 56-5-2953 (2010) (providing in relevant part: “(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 videotaped. (1) The videotaping at the incident site must: (a) begin not later than the activation of the officer's blue lights and conclude after the arrest of the person for a violation of Section 56-5-2930, 56-5-2933, or a probable cause determination that the person violated Section 56-5-2945; and (b) include the person being advised of his Miranda rights before any field sobriety tests are administered, if the tests are administered.”).

Officer Lowe recalled that this observation prompted him to activate his blue lights and that Officer Donnie Ng arrived approximately two minutes later to assist in the traffic stop. R. 19, ll. 14-25. Officer Lowe revealed that, although Officer Ng *also* did not have an in-car video camera, Petitioner's field sobriety tests were recorded by "a small [personally owned video] camera [Officer Ng] had on his person." R. 19, ll. 3-24.²

On cross-examination, Officer Lowe noted that the marked patrol car "was a 2002 or 2003 model, Crown Vic." and that he was assigned to drive that patrol car about two months prior to this traffic stop. R. 23, ll. 11-16. Officer Lowe also admitted that as an officer for the GPD, he conducts traffic stops and issues tickets for traffic violations. R. 24, ll. 7-11.

Lieutenant Joe Browning of the GPD testified that he oversees the financial side of the GPD. R. 24, l. 21 – 25, l. 14. He testified the GPD received a handful of cameras from the Department of Public Safety ("DPS") prior to 2001. R. 27, ll. 1-3. The first four cameras were given to the GPD by the DPS as part of a safety award. R. 27, ll. 23-24. Lieutenant Browning testified that after that, the GPD started trying to purchase its own cameras. R. 27, ll. 24-25. On December 12, 2001, the GPD purchased around eighteen (18) cameras for around \$35,550.00 that started failing as soon as the cameras were installed. R. 28, l. 1 – 15.

On February 13, 2002, the GPD was notified by the DPS that it would be receiving cameras from the State after the change in the DUI law. By the end of 2004, the GPD had received twenty-one (21) cameras from DPS. R. 31, ll. 11 – 20; 40, l. 7 – 42, l. 3. At the

² The video recorded by Officer Ng did not begin until after Petitioner had already been pulled over and exited his car. R. 119, ll. 15-23. The State has not argued on appeal that the video recorded by Officer Ng meets the requirements of § 56-5-2953.

time of Petitioner's arrest on March 18, 2010, approximately eight (8) of these cameras remained installed. R. 77, ll. 4-18.

Around the end of 2007 or the beginning of 2008, the GPD decided to think about procuring its own cameras and put together a committee to research the purchasing of cameras. R. 42, ll. 18-22. In 2008, the committee decided that it only wanted the GPD to purchase digital cameras and not VHS cameras. R. 43, ll. 8-14. Lieutenant Browning testified that the VHS cameras had been problematic for the GPD. R. 46, l. 7 – 47, l. 2.

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 twenty (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.

On February 23, 2010, the GPD finally purchased its first order of digital cameras. This date was less than a month before Petitioner's arrest on March 18, 2010. R. 55, ll. 2-5. The GPD initially purchased thirteen (13) digital cameras on February 23, 2010 for \$56,992.00. R. 55, ll. 2-5; 76, l. 12-24; 182. The GPD purchased another seventy-six (76) digital cameras between September and December 2010, after Petitioner's arrest. The GPD expended approximately \$346,319.00 on these cameras. R. 76, l. 25 – 77, l. 3; 182.

Lieutenant Browning testified that the GPD owned approximately one hundred and seventy (170) marked patrol vehicles. R. 59, ll. 15-23. He admitted that out of the GPD's one hundred and seventy (170) marked patrol vehicles, only about twenty-one (21) had

video cameras installed when Petitioner was arrested. R. 78, ll. 4-18. Lieutenant Browning further testified that the GPD had no internal budget dedicated for cameras. R. 71, ll. 24-25.

On cross-examination, Lieutenant Browning admitted that GPD had double and even triple the number of DUI cases in 2010 than it had in previous years. R. 76, ll. 6-16.

Elaine Johnson, Director of the Department of Resource Management for DPS, admitted that GPD is considered high producing based on the total number of arrests in 2002. R. 94, ll. 9-11. Johnson also revealed that DPS distributed the cameras based on the police departments with the greatest number of video camera requests. R. 97, l. – 101, l. 25; 104, ll. 12-17. Johnson further noted that the GPD “received [the following number of video cameras from DPS:] one in 2002, five in 2003 and a total of fifteen in two different months[,] Ten in February and five in March.” R. 95, ll. 18-23.

After the above presented testimony and additional argument on Petitioner’s motion to dismiss, the Trial Court ultimately denied the motion:

[M]y primary reliance is on footnote 15 of the [*Town of Mt. Pleasant v. Roberts*] opinion in light of Court exhibits 7, 11 and 15 in this case. And that’s solely the basis upon which I’m making this decision. Well, plus the interpretation of that statute and the totality of the circumstances and considering section (b) and section (g). . . . And I think that makes this case quite different from [*Town of Mt. Pleasant v. Roberts*] whereas Greenville was always seeking to get to the trough to get the equipment when they could, expending their own dollars in addition. So I respectfully deny your motion.

R. 113, l. 9 – 114, l. 8.

ARGUMENT

The Court of Appeals erred in affirming the Trial Court's denial of Petitioner's motion to dismiss the DUI charge after the Greenville Police Department failed to comply with the mandatory videotaping provisions of S.C. CODE ANN. § 56-5-2953 (2010) and failed to provide a valid reason for its willful violation of the video-recording requirements.

On May 14, 2014, the Court of Appeals affirmed Petitioner's conviction for DUI, holding that the Trial Court did not err in denying his motion to dismiss the charge because the GPD failed to comply with the video recording requirements of S.C. CODE ANN. § 56-5-2953.

Petitioner 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 Petitioner's DUI arrest, even though the statute requiring video recording at the incident site was enacted in 1998, reversal of Petitioner'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."³ See S.C. CODE ANN. § 56-5-2953 (2010). Subsection (A) of section 56-5-2953 provides in relevant part:

³(citing City of Rock Hill v. Suchenski, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (holding that "dismissal of the DUAC charge is an appropriate remedy provided by section 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions") and Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011) (recognizing the State's noncompliance with section 56-5-2953, which is not mitigated by a statutory exception, warranted dismissal; holding that video complied with section 56-5-2953(A) even though it did not capture a continuous full view of the accused at the incident site (citing Suchenski)).

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 Petitioner 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 Petitioner'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 Petitioner'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 DPS by the end of 2004. The majority of those cameras were eventually uninstalled. At the time of Petitioner'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 Petitioner'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 Petitioner'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.

The Court of Appeals suggested 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 Petitioner'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 new video cameras for its vehicles on February 23, 2010, less than one month before Petitioner 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 Petitioner's arrest. R. 182. At the time of Petitioner'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 Petitioner 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. "By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn,

promulgated a severe sanction for noncompliance.” Roberts, 393 S.C. at 349, 713 S.E.2d at 286. 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 Petitioner’s arrest for DUI.

Accordingly, the GPD failed to satisfy any of the statutory exceptions listed in subsection (B) of section 56-5-2953, and the GPD’s unexcused failure to video record all of Petitioner’s conduct initiating the traffic stop warranted dismissal of Petitioner’s DUI charge. See Roberts, 393 S.C. at 344-50; 713 S.E.2d at 284-87 (finding the Legislature imposed a statutory obligation on the State to create evidence and provided dismissal as a sanction for inexcusable noncompliance).

CONCLUSION

For the reasons set forth herein, Petitioner Christopher Lee Johnson respectfully requests this Court to grant his Petition and issue a writ of certiorari to the Court of Appeals to review the decision, reverse the Opinion of the Court of Appeals and his conviction for DUI, and order that 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

ATTORNEY FOR PETITIONER.

This 24th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5230 (S.C. Ct. App. filed May 14, 2014)
10-GS-23-9683-84

THE STATE,

RESPONDENT,

V.

CHRISTOPHER LEE JOHNSON,

PETITIONER.

APPELLATE CASE NO. 2011-201808

CERTIFICATE OF SERVICE


I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 2920, and the S.C. Court of Appeals this 24th day of July, 2014.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of July, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021