

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUL 25 2014

Appeal from York County

SC Court of Appeals

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CATHY KENNINGTON ROCKET,

APPELLANT

APPELLATE CASE NO. 2013-002523

FINAL BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying defense counsel's motion to dismiss the charge of driving under the influence when the police failed to follow the video recording requirements of S.C. Code § 56-5-2953?

STATEMENT OF THE CASE

Appellant was convicted of driving under the influence, fourth offense, and habitual traffic offender after a jury trial held before the Honorable John C. Hayes, III, on November 18 – 20, 2013, in York County. Five year concurrent terms of imprisonment were imposed. James W. Boyd, Esquire, was the trial attorney. Chris Jones, Esquire, was the assistant solicitor.

This appeal follows.

ARGUMENT

The trial court erred in denying defense counsel's motion to dismiss the charge of driving under the influence because the police failed to follow the video recording requirements of S.C. Code § 56-5-2953.

S.C. Code § 56-5-2953 is titled "Incident site and breath test site video recording." The current version of the statute became effective on February 10, 2009. The relevant part of the statute provides:

(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 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.

On May 13, 2012, appellant was cornered by the police at a parking lot at the Exxon station on Cherry Road in Rock Hill. For about the first eighteen minutes of the video, appellant was not shown on the video. There were only a few seconds where she came on the video, but she went back off. The statute mandates that a person "must have his conduct at the incident site....video recorded. 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 test administered..." (R. 3, lines 3 – 21).

Prior to the statute being amended, a defendant was given a field sobriety test and the legs and feet were cut off during a portion of the test so it was not fully recorded. In Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011), the court held that it was okay that the feet and legs

were not fully recorded as long as the defendant's conduct was recorded. The court did note in footnote 4 that the current statute does require the recording of field sobriety tests. (R. 3, line 22 – p. 4, line 8).

In appellant's case, almost eighteen minutes of her conduct were not recorded at all. In addition, during the walk and turn portion of the field sobriety test, the video shows that the recording did not capture appellant's heels touching her toes that is required in the walk and turn test. Also, as she approaches the patrol car, the hood cuts off her feet and you cannot see her steps and feet. In City of Rock Hill v. Suchenski, 347 S.C. 12, 646 S.E.2d 879 (2007), the court held that a dismissal of the charge was the appropriate remedy when the arresting officer failed to provide a complete video tape from the incident site. In Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011), the court held that the unexcused failure to video record a defendant's conduct warranted dismissal of the case.¹ There the town failed to request additional video cameras for their patrol vehicles. (R. p. 4, line 21 – p. 5, line 17).

In appellant's case, there were two failures to record. The police failed to record appellant's conduct for the first 18 minutes at the incident site and they failed to fully record the walk and turn test of the field sobriety test. Those violations by themselves or combined warranted a dismissal. (R. p. 6, lines 12 – 20).

The assistant solicitor argued that because the police were called on a domestic disturbance, they had no reason to suspect appellant had been drinking. This supposedly excused the 18 minutes of not being video recorded. (R. p. 9, line 4 – p. 10, line 20). With that line of thinking, they

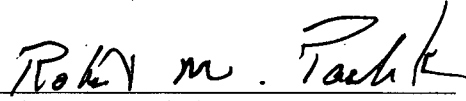
¹ The court also noted the maxim that when a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant. 393 S.C. at 342, 713 S.E.2d at 283.

could use that excuse for any traffic stop that turns into a DUI. In addition, Officer Del Castillo testified that while she was going to the residence of the disturbance, dispatch told her that there was a beige vehicle that had left the residence and the driver was allegedly intoxicated and that the vehicle had pulled into the Exxon station. (R. p. 24, lines 9 – 21). So, if the police knew ahead of time the suspect was intoxicated, there was no excuse not to video record her conduct for 18 minutes.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,

Handwritten signature of Robert M. Pachak in black ink, written over a horizontal line.

Robert M. Pachak
Appellate Defender

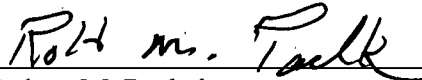
ATTORNEY FOR APPELLANT

This 25th day of July, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 25, 2014



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Appellate Defender

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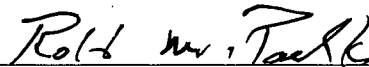
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CERTIFICATE OF SERVICE

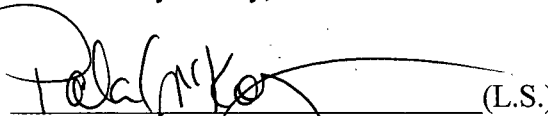
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of July, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of July, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.