STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Greenville County
Hon. G. Edward Welmaker, Circuit Court Judge
Appellate Case Tracking No. 2013-001989

The State, Petitioner,

v.

Gregg Gerald Henkel, Respondent.

Opinion No. 5159 (S.C. Ct. App. filed July 10, 2013)

# BRIEF OF PETITIONER

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II. The trial court properly admitted the videotape and denied the motion to dismiss based on the totality of the circumstances in this case.

## STATEMENT OF THE CASE

### Procedural History

In the early morning hours of January 19, 2008, Respondent was involved in a single car automobile accident. Respondent was indicted in 2009 on charges of driving under the influence by the Greenville County Grand Jury. He proceeded to trial February 3 and 4, 2011, before the Honorable G. Edward Welmaker and a jury. The jury found him guilty as indicted and Judge Welmaker sentenced him to three years in prison, suspended on service of three months and thirty-months probation. He was ordered to perform 180 hours of public service and undergo substance abuse counseling as needed.

Respondent filed a Notice of Appeal, and after oral argument, the Court of Appeals reversed his conviction. See State v. Henkel, 404 S.C. 626, 746 S.E.2d 347 (Ct. App. 2013). The State filed a Petition for Rehearing, which was denied by Order filed August 22, 2013. This Petition follows.

### Factual Background

An eyewitness testified she saw Respondent swerving and "driving kind of crazy." (R. 40; App.42). The eyewitness testified she dialed 911 to report the driver and that she stayed on the phone with 911 while watching the driver of the vehicle swerve and nearly hit other vehicles. (R. 40-41; App.42-43). She testified Respondent hit a bridge, and flipped. Respondent's car went into the ditch. The driver then climbed out and ran across to the other side of the road, jumping a fence. (R. 41; App.43). The eyewitness relayed what she saw to 911, returned to the accident scene, and provided the information to the police when they arrived. (R. 41; 43-44; App.43; 45-46).

Sergeant Hiott with the South Carolina Highway Patrol arrived on scene of the overturned pickup truck. (R. 61; App.63). He testified he talked to the eyewitness and she relayed the events to him. He proceeded to organize a group to search the area for Respondent and after about 20 minutes could not locate him. (R. 62; 64; App.64; 66). The accident occurred a little after 1:00am.

Several hours later, Sergeant Hiott responded to a dispatch call indicating the possible driver of the overturned truck was located wandering the roadway on Interstate 385. Sergeant Hiott arrived and Respondent sat in the back of the ambulance talking to the emergency medical personnel. (R. 65; App.67). Sergeant Hiott got into the ambulance to talk with Respondent and the EMS. He testified when he got into the ambulance, he could smell the alcohol. (R. 66; App.68). He indicated he read Respondent his Miranda rights in the back of the ambulance before performing any tests. He then performed a horizontal gaze nystagmus test (HGN). (R. 65-66; App.67-68). During this time, he remotely activated his camera from a switch on his belt. After performing the HGN, he moved Respondent to the side of his car and had Respondent recite his ABCs which is very clearly recorded on the video. (Court's Exhibit 1 on file with the Court; R. 67; App.69). Sergeant Hiott did not offer Respondent any walking or balancing tests because Respondent indicated his leg hurt. (R. 66-67; App.68-69). Respondent was placed in Sergeant Hiott's car and the camera was turned to record Respondent. Prior to turning the camera, it was aimed out the front of the vehicle which showed the interstate ahead because Sergeant Hiott had to pull to the front of the line of emergency vehicles in order to stop. (R. 83; App.85).

The trial court questioned Sergeant Hiott regarding his activating the camera. Sergeant Hiott indicated he only turned on his back blue lights, which does not activate the camera automatically. (R. 81; App.83). He indicated there were several Simpsonville police cars as well as the EMS and possible the fire department on scene. (R.81; App.83). Sergeant Hiott indicated the EMS vehicle may have been right behind him in the line of vehicles. (R. 81-82; App.83-84). Sergeant Hiott testified he activated the camera by his belt remote as soon as practicable. (R. 87; App.89).

## ARGUMENT

### I. The trial court properly denied the motion to dismiss when the officer complied with section 56-5-2953 to the extent required during the traffic accident investigation.

The trial court correctly found the videotape produced by Sergeant Hiott properly began as soon as practicable under section 56-5-2953(B) of the South Carolina Code (2006) and included all required elements under section 56-5-2953(A) of the South Carolina Code (2006). The majority of the Court of Appeals erred in reversing Respondent's conviction and finding Sergeant Hiott failed to comply with the requirements of section 56-5-2953. The majority of the Court of Appeals incorrectly required the videotape, which was begun as soon as practicable, to include all elements required by section 56-5-2953(A), instead of only those from the initiation of the camera forward as the statute requires. The statute requires conformity, like videotaping, must begin as soon as practicable, and it is a misapplication of the statute to require the officer to restart the elements of subsection (A) once videotaping has begun.

The trial court considered whether the State presented a video pursuant to section 56-5-2953. The court properly found, and the Court of Appeals based on its standard of review agreed, Sergeant Hiott initiated the recording as soon as practicable as required by the statute. Further, the trial court properly found the videotape contained all the required elements because the recording of those elements began as soon as practicable. Finally, the trial court correctly concluded, even though the videotape did not record a view of Respondent performing the HGN test and the ABC test, the statute requires the video to contain Respondent's conduct and the video had the audio of both tests which was the

relevant and important aspect to show Respondent's conduct.[1] (R. 152-154; App.154-156).

Section 56-5-2953 provides 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.

S.C. Code Ann. § 56-5-2953 (2006).[2] The trial court and the Court of Appeals correctly concluded section 56-5-2953(A)(1)(a) does not apply in the instant case because the camera was not triggered by the activation of the officer's blue lights and the investigation was of a traffic accident and not a traffic stop.

Subsection B of the statute provides:

> Further, in circumstances including, but not limited to, . . . , 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

[1] The Court of Appeals opinion does not consider this because it found Sergeant Hiott failed to record all of the elements required under 56-5-2953(A) and as a result the videotape was not properly produced and the case should have been dismissed. If this Court agrees with the State that the statute does not require the officer to duplicate elements of subsection (A) he already performed before it was practicable to begin the videotape, then the Court will likely need to consider whether the videotape which was produced was in conformity with the statute.

[2] This section was amended effective February 10, 2009. Act No. 201, 2008 S.C. Acts 1682–85. Accordingly, the 2006 Code is cited because Respondent's offense occurred in 2008 and Respondent has conceded the amended statute is not applicable to the instant case.

> practicable in these circumstances, videotaping must begin and conform with the provisions of this section.

S.C. Code Ann. § 56-5-2953(B) (2006). As a result of subsection B, the officer does not have to produce a videotape containing all aspects of the incident site and the defendant's conduct at the incident site, but must only produce one beginning as soon as practicable. Further, the language of the statute indicates the videotape must conform to the requirements of 56-5-2953(A) starting with the initiation of the videotaping.

"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 the Court of Appeals agreed, the videotaping began as soon as practicable. The majority of the Court of Appeals, however, maintained the officer must start over the requirements of subsection (A) which include the advisement of Miranda[3] rights prior to the conducting of the field sobriety tests and all the tests performed in order to properly conform to 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.

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

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 is practicable" applies to both when the videotaping must "begin" and when it must "conform" to the requirements of the subsection (A). The clear unambiguous reading is that the conformity must begin at the point the videotaping is begun, 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. In this case, the officer already read Miranda warnings and performed the HGN test, or was performing the test, when the camera was initiated. The majority requires the officer re-complete each of these steps after the videotaping has begun; instead of finding pursuant to the statute conformity with subsection (A) also needed to begin with the recording and requiring only the remainder of the tests to be performed. 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 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 Respondent'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. The exception would only apply to when the camera can be turned on, but, no matter the circumstances faced, the officer would still be required to conduct himself as if he were at a routine traffic stop instead of in the midst of an accident investigation or other situation. The exception in subsection (B) should be read, as the dissent indicates, to only require conformity "as soon as practicable," and the officer in this case met that requirement. Accordingly, the majority of the Court of Appeals incorrectly reversed Respondent's conviction.

The State anticipates Respondent to also maintain the videotape failed to comply with the statute because Respondent is not on camera when the field sobriety tests are conducted, but instead he is heard performing the tests. The State submits the trial court properly found the videotape recorded the relevant conduct of Respondent.

The Court of Appeals analyzed the requirement under subsection (A) that the videotape contain the defendant's conduct in Murphy v. State, 392 S.C. 626, 631, 709 S.E.2d 685, 688 (Ct. App. 2011). In Murphy, the defendant was given the HGN and a walk the line test. The defendant was videotaped from essentially the knees up, and in portions only displayed half her body as she walked to the limit of the camera's field of view. Further the HGN was conducted at the location she completed the walking test "on the fringe of the dashboard camera's field of view" and with her back to the camera. The Court of Appeals properly found:

> [N]othing in the plain language of the statute indicates that an accused remain in full view of the camera for the duration of the encounter. Rather, the statute only requires her "conduct" be recorded. Conduct is generally defined as one's behavior, action, or demeanor. The Oxford Dictionary 158 (2d ed. 2001). Failure of the video to maintain a full view of the accused for the duration of a field sobriety test in which she is made to walk a line, for instance, does not fail to display her behavior, demeanor, and general state. Thus, an accused need not remain in full view of the camera at all times in order for the recording to capture her conduct.

Id. As the Court of Appeals concluded, the important aspect of the video recording is the conduct of the defendant. The relevant conduct necessary to be recorded will depend on the field sobriety test chosen to be given and other circumstances of the particular case.

This Court concluded similarly in State v. Sawyer, Op. No. 27393 (S.C.Sup. Ct. Filed June 4, 2014).[4] In analyzing the breath test site video, the majority of this Court acknowledged the video recording does not have to be perfect. It accepted that some portions of the required elements to be recorded would not need sound because what a viewer hears is not the relevant conduct for recording under the statute. The Court found, similar to Murphy, the video must "adequately [reflect] the individual's behavior."

In this particular accident investigation, the officer used two tests, the HGN, and a recitation of the ABC's test. This Court discussed the HGN in State v. Sullivan:

> Nystagmus is described as an involuntary jerking of the eyeball, a condition that may be aggravated by the effect of chemical depressants on the central nervous system. The HGN test consists of the driver being asked to cover one eye and focus the other on an object held at the driver's eye level by the officer. As the officer moves the object gradually out of the driver's field of vision toward his ear, he watches the driver's eyeballs to detect involuntary jerking.

[4] The State notes its petition for rehearing is currently pending in this case so the opinion has not been released for publication.

State v. Sullivan, 310 S.C. 311, 315 n.2, 426 S.E.2d 766, 769 n.2 (1993) (citations omitted). The ABC test involves Respondent's ability to accurately recite the alphabet. Respondent's appearance on camera was not necessary to a recording of his conduct during either of these tests. As the trial court indicated, the tests "cry out for audio."

The relevant conduct to be recorded in this case was the officer having to repeatedly instruct Respondent to open his eyes and how to perform the HGN test and then Respondent's inability to repeat his ABC's. The videotape sufficiently documented Respondent's conduct at the incident site, especially as the trial court found, in light of the totality of the circumstances of this case. As a result, the trial court properly refused to suppress the videotape and properly refused to dismiss the case, and this Court reverse the Opinion of the Court of Appeals.

## II. The trial court properly admitted the videotape and denied the motion to dismiss based on the totality of the circumstances in this case.

The trial court properly concluded the videotape was admissible and the motion to dismiss should be denied based on the totality of the circumstances in this case. In its opinion, the majority of the Court of Appeals overlooked the remainder of the exceptions included in section 56-5-2953(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, the totality of the circumstances in this case indicate the officer reasonably complied with the requirements of the section and the motion to dismiss was properly denied.

As the dissent in the Court of Appeals properly notes, "this case did not involve a typical DUI investigation and subsequent arrest at or near the site of a traffic stop." This case began when an eyewitness saw Respondent swerving and "driving kind of crazy." (R. 40; App.42). 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. (R. 40-41; App.42-43). Respondent hit a bridge, and flipped his vehicle. Respondent climbed out of the vehicle, ran across to the other side of the road, and jumped a fence attempting to flee the scene. (R. 41; App.43). The eyewitness relayed what she saw to 911, returned to the accident scene, and provided the information to the police when they arrived. (R. 41; 43-44; App.43; 45-46).

Sergeant Hiott with the South Carolina Highway Patrol arrived on scene of the overturned pickup truck. (R. 61; App.63). He talked to the eyewitness and she relayed

the events to him. He proceeded to organize a group to search the area for Respondent and after about 20 minutes could not locate him. (R. 62; 64; App.64; 66). 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 larger vehicles which had full lights.

Further, he had to verify Respondent's condition, as well as make a determination of whether he believed Respondent was intoxicated, thus triggering consideration of the DUI statute. Sergeant Hiott got into the ambulance to talk with Respondent and the EMS personnel. He testified when he got into the ambulance, he could smell the alcohol on Respondent. (R. 66; App.68). Sergeant Hiott made the determination Respondent 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 Respondent's conduct which began as soon as practicable and included everything done at the investigation site from the moment recording commenced.

As the dissent in the Court of Appeals properly concludes: "Thus, when the officer first encountered the suspect four hours after the accident, inside of an ambulance, and after the suspect had wandered down the middle of the highway back toward the site of the wreck that was cleared hours earlier, the totality of these circumstances did not

require video recording, at least not as contemplated by subsection (A) for a typical DUI stop and investigation." Under the totality of the circumstances exception found in section 56-5-2953(B), the trial court properly admitted the videotape and refused to dismiss the case. This Court should reverse the Court of Appeals opinion and find the trial court did not err based on the totality of the circumstances.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be reversed and Respondent's conviction and sentence be reinstated.

Respectfully submitted,

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August 8, 2014

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**PROOF OF SERVICE**

I, Sally Ellison, certify that I have served the within Brief of Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 8th day of August, 2014.

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