STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2013-002406

The State, Appellant,

vs.

Shelby Jean Lorusso, Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON REPLY 1

ARGUMENT 2

I. The circuit court erred in affirming the magistrate's court dismissal of the charge because the video recording is not required to capture every aspect of a field sobriety test; instead, it is required to document the field sobriety test occurred and the defendant's conduct during the test. 2

II. The circuit court erred in finding section 56-5-2953(B) did not apply in this case. In the alternative, Respondent has conceded the State produced a video recording so dismissal was not an available or appropriate remedy. 5

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) 6

State v. Chandler, 267 S.C. 138, 226 S.E.2d 553 (1976) 6, 7

State v. Gordon, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014) 2, 3

State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002) 6, 7

State v. Sawyer, Op. No. 27393 (S.C. Sup. Ct. refiled August 27, 2014) 5, 6

Statutes

S.C. Code Ann. § 56-5-2953(A) (Supp. 2012) 2, 3, 4, 6

S.C. Code Ann. § 56-5-2953(B) (Supp. 2012) 5, 6, 7

STATEMENT OF ISSUES ON REPLY

I. The circuit court erred in affirming the magistrate's court dismissal of the charge because the video recording is not required to capture every aspect of a field sobriety test; instead, it is required to document the field sobriety test occurred and the defendant's conduct during the test.

II. The circuit court erred in finding section 56-5-2953(B) did not apply in this case. In the alternative, Respondent has conceded the State produced a video recording so dismissal was not an available or appropriate remedy.

ARGUMENT

I. The circuit court erred in affirming the magistrate's court dismissal of the charge because the video recording is not required to capture every aspect of a field sobriety test; instead, it is required to document the field sobriety test occurred and the defendant's conduct during the test.

Respondent maintains the magistrate and circuit court correctly construed section 56-5-2953(A) of the South Carolina Code (2012) by requiring the video recording must show the field sobriety tests in such a way that the viewer of the video can judge the results. This is not the requirement within the plain language of the statute, not what this Court required in State v. Gordon, 408 S.C. 536, 759 S.E.2d 755 (Ct. App. 2014), and not the legislative intent behind the video recording statute.[1]

The circuit court's ruling: "To put it plainly, there is no sense in conducting field sobriety tests if the finder of fact can not see the results of such test" adds a requirement to the statute—requiring the video to show the result of the test to the jury—which does not appear within the language itself. (Order of Circuit Court dated September 17, 2013; R.___) (emphasis added). Respondent maintains this is what is required and what was found to be required by this Court in Gordon.

In Gordon, this Court determined: "Because of the purpose of the videotaping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless." Gordon, 408 S.C. at 543, 759 S.E.2d at 758. This Court affirmed the circuit court's finding (on appeal from a magistrate court's finding that the

[1] The State has addressed the plain language of the statute and the legislative intent behind the statute in its Brief. The Reply will address the recent holding of this Court in Gordon as it came out after the State's Brief was written.

recording was only required to show the conduct of the defendant) that the head must be shown during the HGN test. Id. This Court's opinion indicates the actual test could not be seen, but does **not** add the requirement added in this case that the results of the test or the performance of the defendant on the test must also be seen.

The purpose behind the video recording is not to provide a video such that a jury will see exactly what is seen by the officer. The purpose is not to provide the jury with the ability to assess a person's attempt to complete a field sobriety test. The video is to document the arrest, providing a recording of all required items, including the field sobriety tests administered and the defendant's conduct during the tests.

Juxtaposing this case with Gordon, the State complied with the statute. The State produced a video recording in compliance with section 56-5-2953(A).[2] The feet of Respondent can be seen on the video. The viewer can see her from the top of her head all the way to her feet as she performed the heel-to-toe or otherwise known as the walk-and-turn test. The viewer may or may not be able to view her performance with every single step, but under Gordon, that is not required. As Gordon's head is required to be shown to demonstrate the HGN was performed, at most Respondent's feet must be on the video to demonstrate the walk-and-turn test was performed. Respondent's feet are visible so the State complied with the requirements of the statute, even as those requirements have been interpreted by this Court in Gordon.[3]

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[2] Additionally, as the State will discuss in Issue II, Respondent concedes the State has produced a video recording as is required by section 56-5-2953(B).

[3] The State submits the requirements established in Gordon do not comply with the language of the statute or the legislative intent. The State believes a Petition for Writ of Certiorari is pending in Gordon which may result in an opinion from the Supreme Court setting forth the exact requirements for the video recording of field sobriety tests. To the extent necessary, the State will move to argue against precedent if oral argument is granted.

The State produced a video recording. The video recording included the field sobriety tests Respondent performed. The video recording shows all parts of Respondent necessary to document the field sobriety tests were actually performed and shows her conduct during the performance of the field sobriety tests. As a result, this Court should reverse the magistrate's dismissal of this case, allow the case to proceed to trial, and allow the video to be admitted into evidence as it complies with section 56-5-2953(A).

II. The circuit court erred in finding section 56-5-2953(B) did not apply in this case. In the alternative, Respondent has conceded the State produced a video recording so dismissal was not an available or appropriate remedy.

Respondent asserts section 56-5-2953(B) of the South Carolina Code (Supp. 2012) does not apply because the State produced a video recording. Section 56-5-2953(B) and its totality of the circumstances exception clearly do apply when the State has not produced a video recording in compliance with subsection (A).[4] Alternatively, Respondent's concession the State has produced a video recording required under the statute precludes dismissal as an appropriate remedy and reversal is required.

Subsection (B) states in pertinent part:

> Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit. . . . Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances. . . .

Dismissal of a case is only an available remedy because of the construction of subsection (B)'s language that "[f]ailure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal." The South Carolina Supreme Court recently analyzed this language in State v. Sawyer, Op. No. 27393 (S.C. Sup. Ct. refiled August 27, 2014). The Court found: "While defects in evidence do not generally affect admissibility, as the State maintains, the Court has

[4] The State, of course, submits it produced a video recording which meets the requirements of section 56-5-2953(A) and resort to subsection (B) is not required.

interpreted the statute to require strict compliance with Section (A) as a prerequisite for admissibility, unless an exception in Section (B) applies." The Court then concluded: "As explained above, we declined certiorari to consider whether the circuit court might have admitted the flawed tape under § 56-5-2953(B)'s 'totality of the circumstances' exception, and we have determined this tape did not satisfy § 56-5-2953(A)." Importantly, the Court wrote in a footnote: "The only arguable error of law was the circuit court's failure to dismiss the charges once it determined that the State did not produce a videotape meeting the requirements of (A) and that it did not meet any of the exceptions in (B)."

The South Carolina Supreme Court has provided for dismissal as an appropriate rememdy even when a video recording is produced if it fails to meet all the requirements of subsection (A). See City of Rock Hill v. Suchenski, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007). Respondent's entire argument below and before this Court centers on the State's failure to strictly comply with the requirements of subsection (A). Subsection (B) was read in both Sawyer and Suchenski to allow for dismissal when a video recording is produced in the way Respondent uses that term in his brief. If subsection (B) did not contain the language regarding dismissal, the suppression or other remedies would be the only available remedies. See e.g., Sawyer, supra n.5; State v. Huntley, 349 S.C. 1, 5, 562 S.E.2d 472, 474 (2002); State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976).

If dismissal is proper, the Supreme Court's language in Sawyer indicates the Court then looks to an exception such as the totality of circumstances exception. The

magistrate and circuit court clearly erred in failing to consider the totality of the circumstances in dismissing this case.

Alternatively, Respondent argues subsection (B) does not apply because the State "produced a video which was reviewed by the Magistrate." (Resp. Br. 8). As discussed above, the only reason dismissal is an appropriate remedy is because subsection (B) can be read to provide for dismissal. If subsection (B) does not apply as argued by Respondent, then the magistrate and circuit courts committed an error of law in dismissing the case. If, as he concedes, the State has met all requirements necessary to alleviate the need to resort to the totality of the circumstances exception, then this Court should reverse the dismissal of this case and remand for the trial court to conduct the appropriate prejudice analysis dictated under Huntley or Chandler.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the magistrate court dismissing the case and the circuit court's subsequent affirming of the dismissal should be reversed and this case remanded for trial.

Respectfully submitted,

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September 2, 2014

STATE OF SOUTH CAROLINA

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The State, Appellant,

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PROOF OF SERVICE

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

Christopher A. Wellborn, Esquire
142 Oakland Avenue, Suite C
Rock Hill, South Carolina 29730

I further certify that all parties required by Rule to be served have been served.
This 3rd day of September, 2014.

Sally Ellison

SALLY ELLISON
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ALAN WILSON
ATTORNEY GENERAL

September 3, 2014

Christopher A. Wellborn, Esquire
142 Oakland Avenue, Suite C
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RE: State v. Shelby Lorusso
Appellate Case Tracking No. 2013-002406

Dear Mr. Wellborn:

I am enclosing two (2) copies of the Initial Reply Brief of Appellant in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

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

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services