

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Williamsburg County
Honorable George C. James, Jr., Circuit Court Judge
Appellate Case Tracking No. 2011-204146

The State,

Respondent,

vs.

Marty Baggett,

Appellant.

PETITION FOR REHEARING

On June 24, 2015, this Court reversed the trial court's decision denying Appellant's motion for a directed verdict based on the fact the State did not produce a video recording of the incident scene pursuant to section 56-5-2953 of the South Carolina Code. This Court misapprehended or overlooked relevant law providing for "great deference" to the trial court in making findings of fact and determinations regarding the totality of the circumstances, as well as the facts presented at trial which clearly supported the trial court's conclusions. Further, this Court only references those facts supporting the Appellant's position and completely ignores significant testimony and other evidence which provides ineluctable support for the trial court's determination. Finally, this Court creates a definition of "as soon as practicable" that is solely tied to the type of crime involved and gives no consideration to the actual scene or "totality of the circumstances" the officers faced when they were investigating. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the trial

court properly considered the totality of the circumstances and refused to dismiss the case based on the failure to produce a video under section 56-5-2953, and affirm Appellant's conviction and sentence for felony DUI.

First, this Court incorrectly finds the trial court erred in failing to direct a verdict of acquittal on the felony DUI charge based on the lack of a video by the State. The production a video in compliance with section 56-5-2953 of the South Carolina Code is not an element of the crime of felony DUI the State is required to prove, and therefore, the lack of a video does not constitute a failure of competent evidence to prove the crime. See Rule 19, SCRCrimP ("On motion of the defendant . . . the court shall direct a verdict in the defendant's favor . . . if there is a failure of competent evidence tending to prove the charge in the indictment."). Instead, the production of a video is a collateral procedural requirement. While dismissal may be an appropriate remedy for the failure to produce a video recording which is not excused by one of the exceptions in subsection B of the statute, the trial court cannot be found to have erred in failing to direct a verdict based on the failure to produce a video. See City of Rock Hill v. Suchenski, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (finding dismissal for failure to comply with section 56-5-2953 "an appropriate remedy"). Additionally, as the State maintained in its Brief, ample evidence was presented to the jury to support a conviction for felony DUI, and, as a result, the trial court properly denied a directed verdict motion.

Further, Appellant never moved for dismissal based on the failure to videotape the incident scene. Instead, he waited until the State had presented its case and rested prior to raising the issue to the trial court. Based on his actions, there is no evidence in this record indicating the beginning of video recording was practicable because the issue was

never addressed. The trial court ruled in the State's favor finding the totality of the circumstances allowed the case to proceed and so the State was not required to then present further evidence showing video recording was also not practicable as it was the successful party on the motion on a different theory. See e.g., I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 423, 526 S.E.2d 716, 725 (2000) ("However, when the lower court rules in one party's favor, it is not necessary for that party to return to the court and ask for a ruling on remaining issues and arguments in order to preserve those arguments for use in an appeal.").

Next, this Court appears to use an incorrect standard of review in determining whether the trial court properly found the failure to provide a video recording was excused by the totality of the circumstances. This Court does not take a *de novo* view of the evidence in the record. See State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). The trial court is the only court which has the ability to consider the facts and credibility of the witnesses and make its own findings of fact. This Court must give deference to those findings and uphold them if there is any evidence to support them. Id. at 6, 545 S.E.2d at 829 ("We are **bound** by the trial court's factual findings unless they are clearly erroneous.") (emphasis added). The Court is not free to insert its own opinion or view of the facts for that of the trial court. See e.g., State v. Barrs, 257 S.C. 193, 184 S.E.2d 708 (1971) ("It was [the trial court's] duty to judge the credibility of the witnesses and resolve the issue accordingly. He has done so, and **we have no authority to interfere with his finding.**").

This Court picked through the record to find some evidence supporting the arguments of Appellant but cleverly ignored pages of testimony supporting the trial

court's decision. This Court is tasked with determining whether any evidence supported the trial court's finding and, in doing so, is to give that finding the great deference it deserves. When all testimony and other evidence in the record is considered, evidence clearly exists supporting the trial court's finding, including the facts and testimony cited by the trial court in making the ruling on the post-trial motion. (R.360).

First, Appellant told several versions of what happened, but frequently claimed the victim was driving the truck and fell out of the vehicle. (R.132; 143; 150-152). Even at trial his counsel explained "consistently, throughout the course of this trial, Mr. Baggett has maintained, she fell out the truck?" (R.156). His own statements belie the argument the State was required to video record the scene because he maintains he was not driving the vehicle.¹ The officers were responding to a call involving a body in the road. The only person present at the time of the actual incident indicated multiple times the victim was the driver.² They were not responding to a DUI or even a typical accident scene involving a drunk driver. As a result, there was no reason for them to believe they needed to record the incident site pursuant to section 56-5-2953.

Additionally, the scene did not make it practical to begin a video recording under the statute. Officers testified fire and emergency medical personnel were already on the scene when they arrived. (R.129). According to Mr. Stagers, who was a corporal in the Williamsburg County Sheriff's Department at the time of the incident, roughly fifteen people arrived before he did including fire, voluntary fire, and medical personnel. (R.135-136). There were numerous individuals on scene, including Appellant's family.

¹ His driving the vehicle was a clear question for the jury and one they answered finding he was driving based on their guilty verdict for both felony DUI and reckless homicide.

² The State acknowledges there is also evidence in the record indicating he told Stagers he was driving as well as the fact the victim was hit by the vehicle on the passenger's side and not the driver's side.

(T.161-162; R.138-139). Investigator Boston also indicated numerous individuals were on scene, including Appellant's family. (R.168-169). The officers were more interested in securing the scene and investigating the homicide than they were a DUI. (T.77; 160; 198; 208; 211; 218; R.54; 137; 162; 172; 175; 182). Significantly, when asked about conducting field sobriety tests, Officer Staggars testified: "it was not safe to conduct that at the time." (T.160; R.137).

Even Appellant's counsel's own questions demonstrate why this was not a typical DUI investigation or even a DUI investigation after a traffic accident. This scene was considered more of a possible murder scene. Appellant's counsel asked Officer Scott: "You were there that night and you were going to determine whether this was an accident or a murder. Isn't that correct?" Officer Scott indicated he was merely there to process the scene for evidence. (T.95; R.72)(emphasis added). Later he was asked by Appellant's counsel: "That night you processed the scene like it might be a murder, correct?" Officer Scott responded: "I don't know what we had at the time . . . Processing the scene, it was based on what we had." (T.98-99; R.75-76)(emphasis added).

The trial court, in making its ruling that the totality of the circumstances excused the failure to provide a video, specifically found the testimony of Investigator Boston relevant and significant. This Court completely ignored the majority of the testimony of Investigator Boston which was relied on by the trial court and should be given great deference. Investigator Boston testified his main concern was not the DUI but was "the situation at the time." (R.149). That situation included a dead body, numerous people at the crime scene, Appellant's family being at the crime scene, and a scene in which it was not safe to perform field sobriety tests.

Appellant's counsel again asked a very poignant question: "Okay, now **initially, you were investigating a murder.** Isn't that right?" Investigator Boston testified he was initially investigating a murder. (T.198; R.162) (emphasis added). He specifically testified: "I was concentrating on the murder." (T.208; R.172). Appellant's counsel then asks: "Okay, because this case was investigated as a murder?" Investigator Boston responds: "That's right." (R.172) (emphasis added). He was not investigating a DUI and so he had no reason to institute the protocols for a DUI investigation instead of the much more serious murder investigation.

When questioned about Williamsburg County Sheriff's Department's failure to follow the law regarding a DUI, Investigator Boston indicated he "can't say not following the law . . . to investigate a murder." (T.211; R.175). Appellant's counsel responds: "but now that's not what we're doing here today." His response clearly acknowledges the investigation at the time of the incident was a murder investigation and subsequently the charges involved DUI. Clearly, the officers on the scene did not believe at the time they were investigating a DUI or a simple traffic accident. Instead they were investigating a possible homicide and so the video recording of the incident scene was not necessary.

This Court found several isolated portions of testimony to support Appellant's argument the State should have recorded the scene, and then completely ignored all the above testimony presented to the trial court to come to the conclusion "no evidence [supports] the trial court's conclusion that the 'totality of the circumstances' exception under section 56-5-2953(B) applies." This Court does not view the evidence *de novo*, nor does it substitute its view of the evidence for that of the trial court. It is apodictic the testimony from Investigator Boston, which was specifically listed in the trial court's

order as support for the court's conclusion to not dismiss the case, has to constitute some evidence indicating the totality of the circumstances supported the decision to allow the trial to proceed without a video recording. Couple that testimony with the testimony of Officers Staggers and Scott indicating the nature of the scene and the confusion as to what the actual situation involved, clearly the totality of the circumstances excused the failure to video tape.

Importantly, initiating the video recording would have accomplished nothing and been a purely futile act. Corporal Staggers indicated he read Appellant his Miranda warnings and placed him in his vehicle upon his arrival. Even assuming the camera could have been activated³ at the point in which they should have known he was drunk, nothing further would have been recorded except the general scene.⁴ As mentioned above, it was too dangerous at the scene to perform field sobriety tests, so once Appellant was placed in a vehicle, the camera would have only shown various people coming and going from the scene and offered no evidence relevant to the issue of Appellant's intoxication. See State v. Henkel, Op. No. 27541 (S.C. Sup. Ct. filed July 1, 2015). "Subsection (A) was intended to capture the interactions and field sobriety testing between the subject and the officer in a typical DUI traffic stop where there are no other witnesses." Id. citing Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). (finding the purpose of § 56-5-2953 is to create direct evidence of a DUI arrest). Pursuant to the Supreme Court's recent opinion in Henkel, the State did not have to go back and do the Miranda warnings in front of the camera. Nothing else was even

³ This Court's opinion supposes the officers should have begun their recording by the time Corporal Staggers read Appellant his Miranda warnings.

⁴ As discussed above, because Appellant waited to make his motion as part of a directed verdict motion, we do not know if initiating the camera would have ever been practical, much less at what point it could have become practical.

required to be recorded by the statute. As discussed in Henkel, the video recording is relevant to establish Appellant's intoxication and the process of determining his intoxication. As in Henkel, there was sufficient testimony from numerous witnesses, including individuals not associated with law enforcement, to support a conclusion Appellant was intoxicated without resort to field sobriety tests or any other indicator. The video recording was not necessary to preserve the interactions between the lone individual and law enforcement as there were numerous individuals on scene, including Appellant's own family. As a result, the recording would have provided absolutely zero evidentiary value and certainly would not have supported the intent of the statute as discussed in Roberts and Henkel.

Finally, this Court has created its own definition of "as soon as practicable" which ties the requirement of videotaping to when the officers "knew or should have known this was a DUI case." The requirement does not take into account the scene described above, does not consider the officer's investigations and beliefs regarding what investigation they needed to conduct, and does not consider whether recording actually would have accomplished anything relevant pursuant to the intent of the statute. The determination of when recording becomes practical should be based on all the evidence before the court and not just when an officer should have known DUI was a possible charge.⁵ This Court's determination that the video recording became practical solely because the officer knew or should have known it was a DUI case ignores the reality of the scene, the investigation being performed by the officers, and the intent of the video recording statute itself.

⁵ It is important to note that while Appellant was initially charged with DUI, that charge was subsequently dropped and he was charged with murder and kidnapping. Those charges were then dropped and he was charged with reckless homicide and felony DUI both of which he was convicted.

In addition, the fact he was charged with DUI is not determinative of whether video recording was practical or even necessary. The officers were in the midst of an investigation regarding the possible murder of the victim. Appellant was subsequently charged with murder and kidnapping and the DUI charge dropped. Clearly, the DUI charge was not the primary focus of the officers. Further, even though this Court can point to a couple facts in the record which support the argument video recording should have been done, it does not require reversal of the trial court's determination because there is other evidence, and the State submits significantly more evidence, indicating the failure to videotape was properly excused based on the totality of the circumstances.⁶

⁶ This Court's holding, relying solely on evidence favorable to Appellant and ignoring evidence supporting the trial court's decision, is similar to "looking over the heads of the crowd and picking out its friends." Roper v. Simmons, 543 U.S. 551, 616, (2005) (SCALIA, J., dissenting).

CONCLUSION

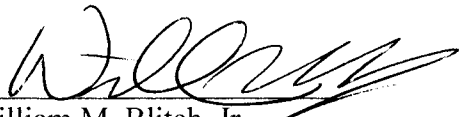
For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find there existed evidence in the record to support the trial court's finding the totality of the circumstances excused video recording, and affirm Appellant's convictions and sentences.

Respectfully submitted,

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PROOF OF SERVICE

I, William M. Blicht, Jr., certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 9th day of July, 2015.



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