THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Gregg Geral Henkel, Respondent

ON THE WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion Nº 27541
Heard April 22, 2015 - Filed July 1, 2015

Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Rules of Appellate Practice, Gregg Gerald Henkel respectfully requests that this Court rehear this matter to correct the following errors and omissions:

1. In concluding that the statute involved in this case was ambiguous, this Court was under an obligation under the established precedent in this State to interpret the statute in favor of the defendant. As this Court has said "When a genuine ambiguity exists as a result of the proposed application of section 17–25–50 to a given situation, the rule of lenity requires that the doubt must be resolved in the defendant's favor." *Bryant v. State*, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009). In this case, the Court failed to resolve the ambiguity in favor of the

Defendant.

2. This Court stated in the opinion that the statute was ambiguous.[1] In so holding this Court held that meaning of "as soon as practicable" and whether it applies to the contents of the video recording is ambiguous. This Court, however, failed to explain why requiring strict compliance with subsection (A) when video began after an accident was ambiguous. The statute is very clear that when video taping begins the officer must fully and completely comply with subsection (A). Such a requirement is not ambagious because it leads to absurd results or compliance would be impossible. This Court held "We find the language of the exception in subsection (B) ambiguous and construe the exception to require compliance with subsection (A) when it becomes practicable to begin videotaping." *State v. Henkel*, Op. Nº 27541(S.C.Sup.Ct. filed July 1, 2015) at 35-36. Notwithstanding the use of the word "ambiguous," Respondent agrees with this interpretation, but nothing is ambiguous as to what the requirements of subsection (A) are. At the time of this case, the unambiguous requirement was that *Miranda* warning be given before the field sobriety tests. The Court of Appeals stated this failure alone was sufficient to require reversal and therefore did not need to discuss whether the other video tape errors were a basis for reversal. What this Court has done is simply re-write an unambiguous statute and insert ambiguity into it. This Court said "We hold the phrase 'as soon as videotaping is practicable in these circumstance,' applies to both when videotaping must 'begin' and when videotaping must 'conform to the provisions of this section.'" The section, which was formerly very clear, is now ambiguous. The statute did not previously say that "*Miranda* need not be on video when to do so is impracticable." But this is what the statute now

[1] The State in its brief argued that the statute is not ambiguous. Br. of Petitioner at 8

means. How does a trial court determine if the application of this standard is practicable? The trial court never made such a finding and neither has this Court. Before the statute could not have been clearer that after an accident and the officer turns on the video camera he is required to give the *Miranda* warning on video before the field sobriety tests, if they are administered.

The Court in this case held compliance with subsection (A) need only begin at the time the videotaping became practicable, and continue until the arrest is complete. The Respondent has no quarrel with this conclusion because if this rule were applied to this case the decision of the court of appeals would have been affirmed. The trial court found, as noted by this Court, that the officer activated his video as soon as practicable. Rec. on App. at 155, 18-19. This Court then held that "the phrase 'as soon as videotaping is practicable in these circumstances,' applies to both when video taping must 'begin' and when videotaping must 'confirm to the provisions of this section.'" *Id.* at 36-37. Thus, the Court recognizes that in this case the video taping began as soon as practicable and that it thus must comply with subsection (A). On this point the Respondent again agrees with the Court.[2]

3. The Court then concludes that the audio taping of field sobriety tests sufficiently complies with the statute. Such is not the plain reading of the statute. Videotaping as used in the statute means more than a simple audio recording. The statue requires the officer to videotape the field sobriety tests. It does not require or permit him to simply do an audio tape of the field sobriety tests. The statute uses the word "conduct." An audio recording is simply not conduct as traditionally understood. Black's Law Dictionary 4th ed. (1951) defines "conduct" as

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[2] As noted above, the Respondent continues to assert that under the old law there is no evidence in this case that it was not practicable to record the *Miranda* warnings on the video even if the Respondent was not on the video.

"Personal behavior; deportment; mode of action; any positive or negative act." Those terms simply would not apply to a simple audio recording.

The Respondent is not urging that a technical violation should be grounds for dismissal of the case nor has respondent ever urged such a position. But the complete failure to record any conduct while administering the field sobriety tests is not a technical violation of the statute. This Court has in essence re-written the statute so that word "conduct" does not mean actual conduct but means an audio recording. The legislature used the word videotape. They did not give the alternative of audio tape. The plain reading of the statute does not permit this court to hold that the requirement that the event be videotaped actually means "audio recording" as held by this court. When the legislature uses a term, the term should be given it plain and ordinary meaning. As this Court has held "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The opinion in this case changes the word "video" to "audio." This Court failed to explain what the in the statute permit it to make this substantive change.

4. In deciding *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011) and *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007) this Court held the videotaping requirements of the S. C. Code § 56-5-2953 are mandatory. More than eight years have passed since the first of those decisions holding that cases should be dismissed for a videotaping violation. During that time period the legislature has amended the law in only one minor respect - *Miranda* need not be given before field sobriety tests. The legislature has never amended the statute to lessen the mandatory requirement of the statute which this Court upheld.

They have never amended the statute to say "substantial" compliance is sufficient. They have never amended the statute to say "all the conduct need not be on the video." They have never amended the statute to say "failure to comply with the video requirement is not a ground for dismissal of the case." As this Court has previously said " [T]here is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997). The legislature has never sought to lessen the prior decisions of this Court. The only logical conclusion is the legislature approved of the decisions

Granted dismissal of a case for a videotape violation is a harsh remedy. As a result some guilty defendants may escape their just punishment. But our courts are not just about convicting the guilty. We are also about acquitting the innocent. Strict compliance with the video taping laws will also help acquit the innocent because the officers are required to record actual conduct and not just statements. Conduct that a jury can see and observe to determine if the defendant is in fact under the influence. An officer simply saying "He was unsteady on his feet" is not longer sufficient to convict in South Carolina. The legislature mandates that this conduct be on video for the jury to see. This Court should be ever mindful of the fact that the easier we make the law to convict the guilty, the easier me make it to convict the innocent.

CONCLUSION

For the foregoing reasons this Court should rehear this matter and issue a new opinion affirming the decision of the South Carolina Court of Appeals.

July 9, 2015

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AFFIDAVIT OF SERVICE

Personally appeared before me, Sandy Traynham, who, after being duly sworn, deposes and says that she is the receptionist for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on July 9, 2015, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Rehearing in the above case addressed to William M. Blitch, Jr., Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211

Sandy Traynham

SWORN to and Subscribed

before me this 9 day

of July, 2015.

Mary Jane Harter (L.S.)
Notary Public for South Carolina
My Commission expires: 11/30/22