THE STATE OF SOUTH CAROLINA

ORIGINAL

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MARTY BAGGETT,

APPELLANT

Appellate Case No. 2011-204146

Appeal from Williamsburg County

George C. James, Jr., Circuit Court Judge

Opinion No. 2015-UP-311

PETITION FOR REHEARING

On June 24, 2015, this Court unanimously reversed Appellant's conviction for felony driving under the influence (DUI) in an unpublished opinion. State v. Baggett, Op. No. 2015-UP-311 (S.C. Ct. App. filed June 24, 2015). On July 9, 2015, the state filed a petition for rehearing. On October 21, 2015, this Court granted the petition for rehearing, dispensed with further briefing and argument, and substituted an opinion for the previously issued opinion. In the new opinion, this Court affirmed Appellant's conviction for felony DUI. State v. Baggett, Op. No. 2015-UP-311 (S.C. Ct. App. filed Oct. 21, 2015). Pursuant to Rule 221(a), Appellant files this petition for rehearing in light of the significant points overlooked and/or misapprehended by this Court in granting the state's petition for rehearing and issuing a new opinion explained more fully below.

First, this Court ignored the clear and unambiguous *facts* indicating the police officers were aware they were investigating a potential DUI prior to their arrival to the scene or, at a minimum, shortly after their arrival based upon their observations of and conversations with Appellant. Second, this Court relied heavily upon State v. Henkel, 413 S.C. 9, 774 S.E.2d 458 (2015). This reliance was misplaced. Third, the "exception" *created* by this Court in affirming Appellant's conviction swallows the "rule" and denies the plain meaning of the statute.

Procedural history

In the opinion released on June 24, 2015, this Court unanimously held the trial court erred in failing to direct a verdict of acquittal on the felony DUI charge where law enforcement failed to abide by the statutory video requirement. Specifically, this Court held the record contained no evidence to support the trial court's conclusion that the "totality of the circumstances" exception found within the statute was applicable to excuse law enforcement's failure to comply. This Court rejected the trial court's explanation that "the circumstances at the incident site did not immediately point to a DUI scenario and the law enforcement officers were investigating the incident as a kidnapping and murder."

In rejecting the trial court's explanation, this Court noted that Appellant was charged with DUI, *and only DUI*, on the night of the incident. Further, this Court relied upon testimony by multiple police officers that Appellant appeared "highly intoxicated" and had admitted to driving. In fact, a police investigator admitted that "at first it was a DUI that kind of morphed into something else." Thus, law enforcement was required to begin videotaping "as soon as practicable" pursuant to the statute. As this Court explained, by the time the officer first read Appellant his rights, the officer knew or should have known that this was a DUI case and should have begun videotaping the

incident site. In light of the officer's failure to begin videotaping as soon as practicable, as required by the statute, this Court held the trial judge should have dismissed the felony DUI charge.

On July 9, 2015, the state filed a petition for rehearing. The state argued this court (1) failed to afford "great deference" to the trial court in making findings of fact and determinations regarding the totality of the circumstances, (2) only referred to facts supporting Appellant's position, and (3) created a definition of "as soon as practicable" tied solely to the type of crime involved and gave no consideration to the actual scene of "totality of the circumstances" the officer faced when they were investigating.

On October 21, 2015, this Court granted the state's petition, withdrew the previous opinion, and substituted a new opinion, in which this Court affirmed Appellant's conviction for felony DUI. Relying heavily on State v. Henkel, 413 S.C. 9, 774 S.E.2d 458 (2015), this Court held "videotaping never became practicable," the statutory videotaping requirements were not applicable, and that the "dismissal of the felony DUI charge was not required under the totality of the circumstances."

Undisputed record facts requiring statutory videotaping

According to this Court, statutorily-mandated videotaping was *not* required because the police were unaware they were investigating a felony DUI or a DUI; rather, "[t]he law enforcement officers were responding to the report of a dead body in the roadway." A review of the record reveals the police were aware from the *very* beginning that this matter involved a potential DUI. At a minimum, the officers were aware of the potential DUI charge when the officers smelled alcohol on Appellant and obtained admissions from Appellant that he was drinking and driving.

During the 911 call, Carolina Jones informed the dispatcher that Appellant, whom she called "the white guy," was acting like he was drunk. See 911 call transcript. The police were also aware that Appellant was driving the white truck at the scene according to the 911 call made by his father,

Ralph Baggett. See 911 call transcript. Further, the dispatcher inquired if Appellant "hit this person" and Appellant's father responded, "I reckon, but I don't know what happened." See 911 call transcript. Based on this information, the dispatcher characterized the incident as an accident during radio discussions with law enforcement, emergency medical personnel, and the fire fighters. See 911 call transcript. There is *no doubt* that Juan Ballard, one of the first officers on the scene and the officer who charged Appellant with DUI, was in direct contact with the dispatcher and was aware of the nature of the call. R. 184, line 18 – R. 185, line 4. Boston testified that he "received a call from Sergeant Ballard in reference to a vehicle versus a pedestrian," which prompted him to respond to the scene. R. 141, lines 12-14.

Staggers testified that Appellant "seemed to be unstable on his feet," and "had a[n] odor of alcoholic beverages on his person." R. 130, lines 10-14. In fact, Staggers told the jury Appellant "had been drinking." R. 130, lines 14-15. Staggers also told the jury that he identified Appellant as the driver of the white truck on the scene. R. 130, lines 19-21. Staggers also dvised Appellant of his rights. App. 130, line 24 – App. 131, line 1. Thereafter, Staggers took a statement from Appellant. App. 132, lines 13-21. Although Staggers claimed Appellant had been drinking alcohol and that Appellant had admitted to driving the truck, he did not administer any field sobriety tests. App. 137, lines 1-16; App. 138, lines 2-7. Staggers claimed that Appellant "was unsteady on his feet and it was not safe to conduct [field sobriety tests] at the time." App. 137, lines 19-20; App. 138, line 7.

Sergeant Juan Ballard observed Appellant after Staggers had spoken to him. Although Appellant was sitting in Staggers's car when Ballard initially approached him, the officers "pulled him out [of] the car" so that the police chief could speak to him before the investigator arrived. App. 182, line 20 – App. 183, line 4. Ballard saw that Appellant "was staggering around a little

bit." App. 183, lines 5-9. Staggers advised Ballard that Appellant was driving the white truck at the scene. App. 183, lines 13-17. Ultimately, Ballard was the officer who charged Appellant for DUI in this case. App. 184, lines 23-25. His decision to charge Appellant with DUI was based on "the initial investigation." App. 185, lines 3-5. He clarified that he decided to charge Appellant with DUI because (1) Appellant appeared to be highly intoxicated and (2) Appellant initially told Staggers that he was driving. App. 188, lines 9-19.

When Boston arrived, which was shortly after Staggers arrived, Staggers informed Boston of Appellant's statements. App. 133, lines 17-23. Boston also advised Appellant of his rights. App. 141, lines 20-22. Boston testified that prior to speaking to Appellant, it was his understanding that Appellant was the driver of the white pick-up truck. App. 142, lines 1-3. Like Staggers, Boston claimed he "could smell alcohol" on Appellant. App. 144, lines 14-15. Boston said that Appellant's "speech was slurred" and he was "slouched down in the back of the patrol car." App. 144, lines 15-17. When Boston advised Appellant of his rights, Boston believed Appellant "was very intoxicated." App. 144, lines 17-19. Thereafter, Boston, Staggers, and another officer took Appellant to the police department and continued questioning. App. 145, lines 3-8. When the interrogation ended, Appellant was charged with DUI and transported to the detention center. App. 147, lines 18-24. Boston based the DUI arrest on Appellant's admission that he was drinking. App. 148, lines 2-17. According to Boston, "at first it was a DUI that kind of morphed into something else." App. 149, lines 6-8. Further, Boston testified that the deceased's head "looked like it had been run over by a tire." App. 173, lines 10-13.

The clear, unambiguous, and undisputed facts showed the police were aware they were investigating a potential DUI involving a fatality. Based on the 911 call alone, the officers were aware (1) that a "dead body" was in the roadway, (2) that Appellant had been driving the truck

present at the scene, (3) that Appellant may have hit the person who was lying dead in the roadway, and (4) that Appellant may have been drinking. Contrary to this Court's assertion that "law enforcement officers were responding to the report of a dead body in the roadway," the uncontroverted facts show the officers were responding to a potential felony DUI and were aware of the nature of the incident prior to their arrival based on the 911 call.

At a minimum, the officers were aware of the potential DUI charge based upon their observations of Appellant at the scene and his alleged admissions. Staggers was aware of the nature of the investigation based on his observations of Appellant at the scene and his conversation with Appellant in which, according to Staggers, Appellant admitted he had been drinking and driving. Further, the uncontroverted facts show Boston, the lead investigator, was aware that he was responding to "a vehicle versus a pedestrian" situation prior to his arrival because of his telephone call from Ballard. Additionally, when he arrived, Staggers conveyed his observations and Appellant's alleged admissions to Boston. There can be no doubt the officers were well aware they were investigating a potential DUI involving a fatality.

Additionally, this Court held that because Appellant was in Staggers's patrol car when Boston arrived, Appellant "would not have been within camera range of a car-mounted camera." This is not supported by the record. Staggers testified to approaching Appellant, advising him of his rights, and interrogating him. Staggers never indicated where Appellant was during this encounter. R. 130, line 8 – R. 133, line 10. It seems unlikely that Appellant was sitting in a patrol car during the entirety of the interrogation because Staggers claimed *repeatedly* that Appellant was "unsteady on his feet." In order to make such an observation, Appellant would have had to have been "on his feet" at some point during the encounter. R. 137, lines 19-20; R. 138, line 7. While it is true that

Appellant was in Staggers's patrol car when Boston arrived, this was *after* officers were aware of the potential felony DUI charge. R. 141, lines 12-22.

Further, even if Appellant were not "within range of a car-mounted camera" because he was in Staggers's patrol car, there was no evidence in the record that Appellant was immobile or that the cameras were immobile. The officers could have easily moved Appellant to a position in which he would have been within range of a car-mounted camera. In fact, Ballard removed Appellant from Staggers's patrol car so that the police chief could speak to Appellant before Boston arrived. R. 182, line 22 – R. 183, line 4. If Appellant could be removed from the car in order for the police chief to interrogate him prior to the investigator's arrival, then he could have been moved in order for the police to comply with statutorily-mandated videotaping. Finally, this Court's opinion assumes the car-mounted cameras were immobile. The record is devoid of such evidence. Likely, the cameras swiveled to allow law enforcement to capture conduct of individuals in the rear passenger area.[1] Even if the cameras were forward facing only, then the cameras were still mobile by the fact that they were mounted on cars, which are by their nature mobile. The cars could have been moved to place Appellant within range of a forward facing only camera.

State v. Henkel, 413 S.C. 9, 774 S.E.2d 458 (2015)

This Court's reliance upon Henkel, supra, is misplaced. The South Carolina Supreme Court held "when an individual's conduct is videotaped during a situation provided for in subsection (B) [of S.C. Code Ann. § 56-5-2953], compliance with subsection (A) must begin at the time videotaping becomes practicable and continue until the arrest is complete." Henkel, 413 S.C. at 15-

[1] In State v. Henkel, 413 S.C. 9, 10 n. 2, 774 S.E.2d 458, 459 n.2 (2015), the Supreme Court noted that when the officer arrived at the scene, he activated his patrol car's video recording camera, but the "forward facing camera only recorded the highway" in front of the car. However, when the officer placed defendant in his patrol car following his DUI arrest, the officer "faced the in-car camera" toward the defendant. Id. at 11, 774 S.E.2d at 460.

16, 774 S.E.2d at 462. The trial judge's finding that the videotaping began as soon as practicable was not challenged on appeal. Id. at 12 n.5, 774 S.E.2d at 460 n. 5. The *precise* issue in this case is *when* did videotaping become practicable and was the failure to videotape excused; thus, Henkel has limited applicability to the case before this Court because Henkel involved whether the videotape in the case complied with the statutory requirements.

In Henkel, 413 S.C. at 10, 774 S.E.2d at 459, a witness saw a car being driven erratically and ultimately crashing. However, when the officer arrived on the scene, the driver had fled. Id. Several hours later, the same officer responded to a call regarding an individual walking down the same highway where the car crashed. Id. The officer found the individual receiving treatment in an ambulance. Id. The officer advised the individual of his rights and conducted a horizontal gaze nystagmus test. Id. at 10-11, 774 S.E.2d at 459. The officer also initiated his audio recording devise during the administration of the test. Id. at 11, 774 S.E.2d at 459. Thereafter, the officer had the individual recite the alphabet, which was audio recorded. Id. at 11, 774 S.E.2d at 460. The advisement of rights and administration of tests were not captured on video. Id. When the officer placed the individual under arrest for DUI, the officer placed the individual in his patrol car and ensured the video captured the individual's conduct thereafter. Id.

In light of the fact that neither party appealed the trial judge's finding that videotaping began as soon as practicable, the only matter before the Court was whether the video that existed complied with the statute. See id. at 12 n. 5, 774 S.E.2d at 460 n. 5. The precise question was whether an officer would have to re-advise an individual of his rights and re-administer tests after videotaping began if those activities occurred prior to videotaping becoming practicable. Id. at 13, 774 S.E.2d at 461. The Court answered this question in the negative and explained that when the videotaping

became practicable, then the videotape had to capture the individual's conduct at the scene. Id. at 14, 774 S.E.2d at 461.

Henkel offers little help in determining when videotaping becomes practicable pursuant to the statute or when the videotaping requirement may be excused due to the "totality of the circumstances" pursuant to the statute as neither of those questions was addressed by the Court. Nevertheless, resolution of those two questions is necessary in order to adjudicate the issue raised on appeal in this matter. Therefore, this Court erred in relying upon Henkel, supra, in arriving at its conclusion that "videotaping never became practicable," the statutory videotaping requirements were not applicable, and that the "dismissal of the felony DUI charge was not required under the totality of the circumstances."

Plain meaning of the statute

The purpose of the videotaping requirement "is to create direct evidence of a DUI arrest." Roberts, 393 S.C. at 347, 713 S.E.2d at 285. "[T]he videotaping provisions of section 56-5-2953 are mandatory and not optional." Id. at 346, 713 S.E.2d at 285. "A law enforcement agency's failure to comply with [section 56-5-2953] is fatal to the prosecution of a DUI case." Id. In Murphy v. State, 392 S.C. 626, 631, 709 S.E.2d 685, 688 (Ct. App. 2011), this Court explained the plain language of section 56-5-2953(A)(1)(a)-(b) required the video recording to capture "(1) the accused's conduct and (2) Miranda warnings prior to field sobriety tests, if such tests occur." This Court defined "conduct" as one's behavior, action, or demeanor. Id.

This Court's opinion eviscerates the statutory requirement of videotaping by excusing it whenever there is a situation that would not be considered a "normal ... traffic stop," including a traffic accident. The statute specifically contemplates that a DUI investigation will occur outside of "a normal traffic stop" by noting that in some circumstances, such as traffic accident investigations,

an arrest will be made and the videotaping equipment will not be activated by the blue lights. Nevertheless, the statute requires videotaping to begin as soon as practicable even in those situations. See S.C. Code Ann. 56-5-2953(B)(2007). Taking this Court's conclusion that when officers respond to a situation in which "the normal protocol for a traffic stop [is] not applicable" the videotaping requirement does not arise to its logical end, there would never be the need to videotape in *any* traffic accident. Frankly, requiring compliance with the statutory videotaping requirement *only* in "normal traffic stops" would result in almost no videotapes because no two traffic stops are the same and some abnormality would always permit law enforcement to claim the normal protocols, including videotaping, were not followed as a result.

By finding the statutory videotaping requirement not applicable to the instant case because of the presence of other people at the scene, this Court's opinion further guts the statute. In arriving at this conclusion, this Court relied upon Henkel's proposition that the videotaping statute "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." See Henkel, 413 S.C. at 14, 774 S.E.2d at 461. Oddly, the Supreme Court cited Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011) to support this conclusion. Roberts provides no support for such a conclusion. The purpose of the videotaping requirement is "to create direct evidence of a DUI arrest" as the Court held in Roberts, 393 S.C. at 347, 713 S.E.2d at 285. The intent of the legislature to create direct evidence of a DUI arrest was not, and cannot, be limited to situations "where there are no other witnesses" because doing so would eliminate the videotaping requirement in all but the fewest DUI arrests, particularly those where there has been a traffic accident. By its very nature, a traffic accident will require the presence of personnel other than law enforcement – witnesses/bystanders, emergency medical personnel, fire and

rescue personnel. Certainly, the legislature was aware of the likelihood of the presence of others at traffic accidents, but still the legislature required videotaping as soon as practicable at traffic accident scenes when the investigation culminates in a DUI arrest.

The legislature was concerned with more than creating direct evidence only in "one-on-one traffic stops" as evidenced by the language chosen in the statute. See Henkel, 413 S.C. at 15, 774 S.E.2d at 462. Had the legislature been concerned only with "one-on-one traffic stops," the legislature could have made this very point by requiring videotaping only in those circumstances. Instead, the legislature did the opposite and required videotaping in *all* DUI arrests, including those which by their nature would necessitate the presence of others, such as road blocks, traffic accidents, citizens' arrests, and felony DUIs. Additionally, the legislature never carved out an exception, which would permit officers not to comply with the videotaping requirement when others were present on the scene. Such an exemption would have been easy to craft had the legislature actually intended for the videotaping requirement to exist only during "one-on-one traffic stops." Based on the clear language of the statute – and most importantly, language not in the statute – the intent of the legislature was to create direct evidence of DUI arrests in every case. The purpose of the creation of direct evidence is to eliminate a "swearing match" among witnesses regarding what transpired at the incident site.

This Court's opinion creates two exceptions to the videotaping requirement: (1) whenever the arrest is not the product of a "normal traffic stop" and (2) whenever the arrest occurs in the presence of others. The creation of these two exceptions swallows the rule because no videotaping will be required in any DUI arrest as all arrests will likely fall into one of these exceptions. Not only are the exceptions not within the statute, rendering them judicially created laws, the exceptions defy the clear and unambiguous language of the statute.

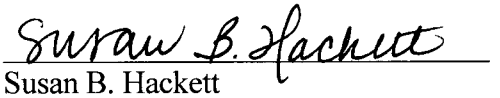
Statutory Exception

This Court failed to consider the exception that is *actually* contained within the statute. The statute allows courts to consider "any other valid reason for failure to produce the videotape based upon the totality of the circumstances." S.C. Code Ann. § 56-5-2953(B)(2007). Oddly, this Court's opinion uses the totality of the circumstances language, but appears to do so when reviewing the trial judge's refusal to dismiss the felony DUI charge: "[T]he videotaping requirements of section 56-5-2953(A)(1)(b) were not applicable. We find dismissal of the felony DUI charge was not required under the totality of the circumstances." Not only does the clear language used by the Court show the "totality of the circumstances" language is not being used to consider the statutory exception, but the juxtaposition of the "totality of the circumstances" language with the finding that the statutory videotaping requirement was "not applicable" demonstrates the Court was not considering the statutory exception to the videotaping requirement.

Had this Court reviewed the exception, this Court would have determined the record fails to support the trial judge's finding that the totality of the circumstances excused law enforcement's failure to video record Appellant's conduct at the incident site. As demonstrated, the officers had ample notice of the potential felony DUI on the scene, and in fact, arrested Appellant for DUI within minutes of arriving. The failure by law enforcement to create the video denied the jury the ability to assess Appellant's conduct. In light of the fact that law enforcement failed to conduct any chemical testing, which would have provided the jury with objective evidence of Appellant's intoxication or lack of intoxication, the video would have been the only objective evidence for the jury to make a determination concerning whether Appellant engaged in felony DUI.

For all the foregoing reasons, Appellant respectfully requests this Court grant the petition for rehearing, withdraw the second opinion, and re-instate the initial opinion.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

This 5th day of November, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Williamsburg County

George C. James, Jr., Circuit Court Judge

THE STATE,

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MARTY BAGGETT,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Marty Baggett #216091, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 5th day of November, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 5th day
of November, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.