STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

George C. James, Jr., Circuit Court Judge

Opinion No. 2015-UP-311 (S.C. Ct. App. filed Oct. 21, 2015)

10-GS-45-00269-00270.

THE STATE,

RESPONDENT,

V.

MARTY BAGGETT,

PETITIONER

Appellate Case No. 2016-000093

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on December 17, 2015. App. 33.

QUESTION PRESENTED

Did the Court of Appeals err in reversing its prior decision to direct a verdict of acquittal in Petitioner's favor on the charge of felony driving under the influence where the prosecution failed to present video evidence of Petitioner's conduct at the incident site as statutorily mandated and where the state failed to present evidence of a statutory exception?

STATEMENT OF THE CASE

Procedural history

A Williamsburg County grand jury indicted Petitioner for reckless homicide (2010-GS-45-0269) and felony driving under the influence (DUI) (2010-GS-45-0270) during its October 2010 term. R. 361-362; R. 364-365. The case proceeded to trial on July 18, 2011, before the Honorable George C James and a jury. R. 1. David Stumbo and Dale Scott of the Attorney General's office prosecuted the case. Sam Floyd represented Petitioner. R. 1. The jury found Petitioner guilty as charged. R. 337, lines 11-17. Judge James sentenced Petitioner to ten years' imprisonment on the reckless homicide conviction. R. 341, lines 8 – 12; R. 366. Judge James sentenced Petitioner to twenty years' imprisonment and a fine of $25,000 on the felony DUI conviction. He ordered the sentences to be served concurrently. R. 342, lines 5-9; R. 363. Petitioner filed a motion for new trial on July 29, 2011. R. 343-349. By an order filed December 2, 2011, Judge James denied Petitioner's motion. R. 359-360.

Petitioner filed a timely notice of appeal, which was perfected. After oral argument on October 6, 2014, the Court of Appeals directed a verdict to Petitioner on the felony DUI charge in an unpublished opinion. State v. Baggett, 2015-UP-311 (S.C. Ct. App. filed June 24, 2015); App. 1-3. On July 9, 2015, the state filed a petition for rehearing. The state argued the Court of Appeals (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 Petitioner'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 officers faced when they were investigating. App. 4-14.

Without requesting a response, argument, or further briefing, the Court of Appeals granted the petition for rehearing, withdrew the opinion granting Petitioner a directed verdict, and substituted a new opinion affirming Petitioner's conviction on October 21, 2015. App. 15-18. Petitioner filed a petition for rehearing on November 5, 2015. App. 19-32. The Court of Appeals denied the petition by written order filed on December 17, 2015. App. 33.

Petitioner now files this petition for writ of certiorari asking this Court to review the Court of Appeals' decision.

Relevant facts

On the afternoon of March 8, 2007, Carolina Jones turned onto Clare Road in Williamsburg County. She saw the road was blocked by Petitioner in a white pickup truck. When she asked to get by, Petitioner refused and stated he had found a dead body. Jones saw Petitioner standing over the body of Jean Turner. R. 106, line 9 – R. 107, line 7; R. 115, lines 2-6. According to Jones, Petitioner seemed kind of drunk because he was staggering and repeating himself. R. 107, lines 15-16; R. 107, lines 22-25. Jones left the area, returned home, and called 911. R. 113, lines 23-25. During the 911 call, Carolina Jones informed the dispatcher that Petitioner, whom she called "the white guy," was acting like he was drunk. See 911 call transcript.[1]

Also, on March 8, 2007, Ralph Baggett received a phone call from his son, Petitioner, concerning the accident. R. 120, lines 18 – R. 121, line 10. Ralph called 911 to report the accident. During the call, Ralph told the dispatcher that Petitioner was driving the white truck at the scene. See 911 call transcript. Further, the dispatcher inquired if Petitioner "hit this person" and

[1] The parties transported the recording of the 911 calls to the Court of Appeals. However, the recordings were misplaced. Therefore, the parties agreed to substitute a transcript of the 911 calls in lieu of the actual recordings.

Petitioner'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.

Vincent Staggers, employed by the Williamsburg County Sheriff's Department, responded to the scene. R. 128, lines 15-21; R. 129, lines 6-8. Staggers claimed Petitioner was unstable on his feet and had an odor of alcoholic beverage on his person. R. 130, lines 10-15. Despite his belief that Petitioner was intoxicated, Staggers did not perform any field sobriety tests on Petitioner. R. 137, lines 12-16. He also conducted no scientific testing to determine if Petitioner had been drinking. R. 137, line 21 – R. 138, line 1. According to Staggers, Petitioner stated Turner was driving the vehicle when she suddenly fell out of the truck. Petitioner then tried to help her. R. 132, lines 9-21.

Steve Boston, another employee of the Williamsburg County Sheriff's Department, responded to the scene. Boston advised Petitioner of his rights. R. 141, lines 9-22. Boston claimed that Petitioner stated that he picked up an unknown woman, who was homeless, at the liquor store. R. 142, lines 10-17. Petitioner stated that he was too drunk to drive so he let the woman drive. As they were traveling down Clare Road, "she just fell out of the truck." R. 143, lines 8-16. Boston testified that he could smell alcohol on Petitioner and that Petitioner's speech was slurred. Boston described Petitioner as "very intoxicated." R. 144, lines 12 – 19; R. 178, lines 19-22. Thereafter, Petitioner was transported to the police department. R. 145, lines 3-8.

Juan Ballard, an officer with the Williamsburg County Sheriff's Office, responded to Clare Road as well. R. 180, line 16 – R. 181, line 14. When Ballard arrived on the scene, Petitioner was in the back of a patrol car. R. 182, lines 22-23. When the police pulled Petitioner

out of the car so that the Police Chief could speak to him, Petitioner was "staggering around a little bit." R. 183, lines 5-9. Ballard testified that it would have been his call "to do DUI testing on the suspect." R. 184, lines 20-22. Ballard arrested Petitioner for DUI based upon Petitioner appearing highly intoxicated and allegedly admitting to Staggers that he had been driving. R. 184, lines 23-25; R. 188, lines 13-19.[2]

At the police department, Petitioner allegedly told Boston that he had picked up a homeless woman and a white male. Thereafter, Petitioner invoked his right to silence. R. 147, lines 5-13. Boston testified that the arrest was based upon Petitioner allegedly admitting to being drunk. R. 148, lines 2-5. Boston testified that Petitioner was ultimately charged with murder, and Boston was unaware of what happened to the DUI charge, as he was not the investigating officer concerning the charge. R. 148, lines 18-24.

Less than a month later, Ballard dropped the DUI charge. R. 185, line 13 – R. 186, line 1. Ballard dropped the charge because Petitioner was charged with murder the day following the accident and he did not have "any blood anything like Breathalyzer blood alcohol" to support the charge. R. 186, lines 20-24; R. 186, line 25 – R. 187, line 2. Regarding testing for DUI, Ballard testified he thought "the BA machine ... was down at that time" in Kingstree. R. 191, lines 4-7. He further testified he thought Hemmingway had a BA machine, but he was uncertain. He denied ever going to Hemmingway to determine if the machine was in working order and available. R. 191, lines 8-18. In direct contradiction of his earlier testimony, Ballard testified

[2] Boston explained that he did not take Petitioner to the hospital in an attempt to draw blood, and that it would have been the job of the evidence custodian to do that. R. 169, lines 19-25. He was aware of the statutory requirement that a person must submit to a blood draw if there is probable cause to believe the person engaged in felony DUI. R. 170, lines 6-15; R. 175, lines 8-12.

that the investigator in charge, presumably Boston, made the decision not to administer breathalyzer test or take blood sample. R. 197, line 20 – R. 198, line 3.

Boston claimed that Petitioner gave another statement to law enforcement. Petitioner ran into Turner and a white male at the liquor store. Petitioner stated that while he was riding he had been drinking all day. Turner and the white male argued while in the vehicle, and Turner asked Petitioner to stop so the man could get out. Petitioner stopped the vehicle and the man got out. Then, Turner was driving the truck. As they went down Clare Road, Turner fell out of the truck. R. 150, lines 12 – R. 151, line 5; R. 152, lines 15-19.

Over the course of the investigation, the police interviewed Thomas "Rod" Garris who provided background information concerning why Petitioner and Turner were together. Garris was romantically involved with Turner for thirteen years. R. 3, line 19 – R. 4, line 2. On March 8, 2007, Garris and Turner began drinking beer around three o'clock in the afternoon. R. 5, lines 5-11; R. 5, line 21 – R. 6, line 8. Garris and Turner met Petitioner at a convenience store where all three agreed to return to Petitioner's house. On the way to Petitioner's house, they stopped at a liquor store. R. 10, line 2 – R. 11, line 20; R. 39, lines 16-18; R. 40, lines 21-22; R. 41, lines 11-23; R. 43, lines 20-25. Garris claimed Petitioner purchased a fifth of Smirnoff vodka at the liquor store, R. 13, lines 8-13, but the owner of the store testified Petitioner purchased one pint of Lord Calvert, R. 48, lines 11-25. According to Garris, Petitioner informed them they would not get out of the truck until they drank the rest of the liquor. R. 15, lines 3-17. Thereafter, they "finished the liquor." R. 15, line 20. The trio continued driving "all over Williamsburg County." R. 17, lines 3-5.

Garris claimed that while he was urinating in a field, Petitioner drove his truck approximately one hundred yards from Garris and then backed up real quick, causing Garris to

jump into a ditch to get out of his way. Despite this alleged act of aggression, Garris returned to the cab of the truck. R. 17, lines 8-24. Garris further admitted that his statement to police did not include anything about Petitioner allegedly trying to back over him. R. 29, line 21 – R. 30, lines 2. When Petitioner stopped the truck on the shoulder of the road about twenty feet from Turner's driveway, Garris exited the truck. Garris claimed he had Turner by the hand to assister her as she got out of the truck. According to Garris, Petitioner grabbed Turner by the arm to prevent her from leaving the truck. Garris threw his beer in the ditch and tried to jerk Turner out of the truck. Petitioner then ran over Garris's arm and left. R. 18, line 14 – R. 19, line 8. Although the Garris claimed Petitioner ran over his arm with his truck, Garris's arm was not broken. R. 32, line 19.[3] Garris walked to Turner's mother's house. Turner's mother took Garris home. Garris did not call law enforcement. Garris admitted that he was high at the time, but denied that he was drunk. R. 20, line 11 – R. 21, line 23.

When questioned by police the following day, Garris stated that he believed Turner probably jumped out the truck. R. 26, lines 1-18. When law enforcement asked if Petitioner had been drunk, Garris told law enforcement, "they had been drinking." R. 30, lines 17 – R. 31, line 9. Garris testified that Turner drank one beer and three or four drinks of liquor that day. R. 35, lines 14-21.

Jeff Scott, an employee with the Williamsburg County Sheriff's Office, responded to the crime scene on Clare Road. R. 52, lines 15-18; R. 53, line 24 – R. 54, line 8. Scott processed the truck several days after the accident, and while the truck was at a private garage. R. 76, lines 8-

[3] The police officer who interviewed Garris did not observe any injuries to Garris. Further, Garris did not tell the police that Petitioner allegedly tried to run over him. R. 154, lines 8-25; R. 155, lines 1-6.

21. Scott admitted he was not aware of how the truck was transported to the private garage. R. 77, line 23 – R. 78, line 1.[4] While processing the truck, Scott found a small stain on the undercarriage of the truck. R. 66, lines 2-14. Scott swabbed the area. R. 67, lines 11 – 17. Scott did not find any of Turner's hair under the truck. R. 92, lines 1-4. Scott's examination of the truck revealed no indentations or impact marks. R. 93, lines 13-24. He testified that the bumper and everything were intact. R. 93, line 24.

Jasper Humbert, a former employee of SLED in the forensic DNA department, analyzed blood samples he received in this case. Humbert's testing of six swabs taken from under the passenger door of Petitioner's truck revealed the presence of blood. Thereafter, Humbert conducted DNA analysis on the six swabs. Humbert testified that based on his DNA analysis, he concluded Turner's blood was found on one of the swabs taken from under the passenger door. R. 245, lines 4-12; R. 249, lines 12-22; R. 255, lines 5-9; R. 255, line 16 – R. 256, line 8; R. 259, lines 1-10; R. 260, lines 16-19. Humbert also tested a swab taken from the front side bumper under the headlight. This sample was negative for blood. R. 263, lines 9-18.

At the trial, Dr. Erin Presnell, a forensic pathologist performed an autopsy on Turner on March 9, 2007. R. 216, lines 15-18. She determined the cause of death was a lot of head trauma. Relying upon the investigation, Dr. Presnell determined Turner's blunt head trauma was most likely caused by a vehicle running over her. However, Dr. Presnell could not determine the manner of death – homicide or accident. R. 218, line 3 – R. 219, line 22. Her scientific results

[4] Boston, the investigator on the case, was unaware of how the truck left the crime scene, but he was aware that the truck was recovered the following day from the Baggett's residence. R. 160, line 16 – R. 161, line 5. In other words, the police did not maintain custody and control over the truck prior to processing it for evidence. Although Boston was the investigator over the case, he testified that it would then the decision of the evidence custodian, Scott, to determine whether to impound the truck. R. 161, lines 14-24.

were inconclusive in that regard. Dr. Presnell drew Turner's blood at the time of the autopsy as part of her standard procedure. Turner's blood alcohol level was 0.387. R. 224, lines 20-23. Further, examination of Turner's liver revealed it was consistent with someone who suffered from chronic alcohol abuse. R. 226, lines 8-24.

Dr. Presnell explained that if Turner had been standing upright outside the truck, she would expect to see leg injuries, often called "bumper fractures." She found no such injuries on Turner. She admitted that one possible scenario was that Turner was upright and a slow moving vehicle knocked her over and then ran her over. R. 229, lines 6-23. However, she explained an equally possible scenario was that Turner fell out the car and was run over, just as Petitioner said. R. 229, line 24 – R. 230, line 4.

At the close of the state's case, Petitioner moved for a directed verdict regarding the charge of felony DUI. Petitioner relied upon Section 56-5-2953 of the South Carolina Code to support his position that Petitioner was entitled to a directed verdict because the state failed to produce a video of Petitioner's roadside arrest. Additionally, Petitioner relied upon case law, primarily Town of Mount Pleasant v. Roberts and City of Rock Hill v Suchenski, to support his motion. R. 273, lines 5-19; R. 275, lines 8-15; R. 274, line 22 – R. 275, line 9; R. 276, line 10 – R. 277, line 5.

The prosecutor argued that the video requirement of section 56-5-2953 provided for an exception. He relied upon the portion of the statute providing "nothing in this section prohibits the court from considering any other valid reason for failure to produce a video recording, based on the totality of the circumstances." The prosecutor argued the exception applied based upon the evidence presented. Specifically, the prosecutor argued that because law enforcement "was

responding to a dead body on the open road out in the rural part of Williamsburg County" the exception applied. He claimed this case was

> [A] completely different scenario than ... in probably 99 percent of the DUI cases in this state, where an officer pulls over a vehicle for, even pulls over a vehicle for suspected DUI or arrives on an accident scene where there [are] injured people and people inside a car, where there's a smell of alcohol. Here you had an individual who was deceased on the side of the road and at that point, the officers, ..., from their testimony on the stand, I believe that they would say they were looking at this dead body, is this a murder or is this an accident or what is this? And they were trying to wrap their arms, at that point, around what they were investigating.... [A] lot of the procedural requirements that are built into the statute here, particularly video tape requirement, ..., I believe under the totality of the circumstances, was not, was not at play here. I believe that's a valid reason why Your Honor could essentially give Williamsburg County Sheriff's Department a pass here for not having a video tape of this crime scene, based on what had happened. ... [A]fter the fact, when they realized that [Petitioner] himself said he was drunk and they had other witnesses there to talk to during the course of the next day or so that confirmed that, that they thought at that point, okay, maybe we have a DUI on our hands as well and he was ticketed for DUI.

R. 289, line 23 – R. 291, line 24.

The prosecutor continued this rationale later when he argued the police had "no thought of video camera taping or anything else relating to the DUI requirements" when they arrived on the scene because there was a dead body on the side of the road and "[t]hey were trying to figure out how to investigate a homicide." In the prosecutor's view, the police could not be expected "to be thinking about the procedural rigors of the DUI statute." R. 303, lines 4-14. Essentially, the state conceded the videotaping requirements applied to Petitioner's case, but argued their failure was excused.

Petitioner countered that the statutory requirements and the case law were clear – the police were required to video the incident site. Failure to do so was fatal to the prosecution's case of Petitioner. R. 293, lines 9-24.

The trial judge denied Petitioner's motion for a directed verdict on the felony DUI charge. Relying upon City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007), the judge found the appellate courts "indisputably established that the videotaping provisions [were] mandatory and not optional." R. 302, line 8 – R. 303, line 1. However, he found the totality of the circumstances excused the mandatory videotaping requirement. R. 304, line 25 – R. 305, line 12.

After the judge charged the jury on the law, the jury asked the judge whether chemical testing was necessary in order to prove felony DUI and/or DUI. The judge responded that he had instructed the jury on the elements of both charges, which was all the prosecution was required to prove. The jury asked to be re-instructed as to both, and the judge complied. R. 331, line 13 – R. 336, line 1. The jury ultimately found Petitioner guilty of reckless homicide and felony driving under the influence. R. 337, lines 11-17.

After the trial, Petitioner filed a motion for new trial. He challenged the prosecution's failure to present videotaping of the incident site. He cited Town of Mount Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011) to support his position. Based upon the failure of the state to produce a video of the incident site, Petitioner moved for a new trial resulting in a dismissal of the charge. R. 343-349.

By order dated November 30, 2011, Judge James held the videotaping requirements applied to Petitioner's case, but that the failure to videotape the incident site was excused based on the totality of the circumstances exception under section 56-5-2953(B). Judge James concluded that "law enforcement was dispatched to the scene and encountered [Petitioner], his truck, the victim's body, and other circumstances that did not immediately point to a DUI scenario." He acknowledged the police testified Petitioner was "visibly intoxicated" and "charged at some point

with DUI." But, he relied upon Investigator Boston's testimony that the incident was being investigated as a possible kidnapping and murder to excuse the officer's failings. R. 359-360.

ARGUMENT

The Court of Appeals erred in reversing its prior decision to direct a verdict of acquittal in Petitioner's favor on the charge of felony driving under the influence where the prosecution failed to present video evidence of Petitioner's conduct at the incident site as statutorily mandated and where the state failed to present evidence of a statutory exception.

In 2007, at the time of the accident, South Carolina law concerning the office of felony DUI provided as follows:

> A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a vehicle and when driving does any act forbidden by law or neglects any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes great bodily injury or death to a person other than himself is guilty of a felony.

S.C. Code Ann. § 56-5-2945(A)(2007). Thus, felony DUI required proof of three elements: (1) the person drove a vehicle while under the influence of alcohol and/or drugs; (2) the person engaged in an act forbidden by law or neglected a duty imposed by law; and (3) the act or neglect proximately caused great bodily injury or death to another person. State v. Grampus, 288 S.C. 395, 397, 343 S.E.2d 26, 27 (1986) abrogated on other grounds by State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997).

South Carolina statutory law also provided that a person who violated section 56-5-2945 "must have his conduct at the incident site and breath site videotaped." S.C. Code Ann. § 56-5-2953(A)(2007). The statute provided that the videotaping at the incident site:

> must begin not later than the activation of the officer's blue lights and conclude after … a probable cause determination that the person violated Section 56-5-2945; and include the person being advised of his Miranda[5] rights before any field sobriety tests are administered, if the tests are administered.

[5] Miranda v. Arizona, 384 U.S. 426 (1966).

Id. The statute excused failure to produce the videos where the officer submitted sworn affidavits regarding inoperable equipment. The statute also provided that in accident investigations, where an arrest was made and the videotaping equipment was not activated by blue lights, the failure by the arresting officer to produce the videotapes required by the statute was not alone a ground for dismissal. S.C. Code Ann. § 56-5-2953(B)(2007). However, the statute required "as soon as videotaping is practicable *in these circumstances*, videotaping must begin and conform with the provisions of this section." S.C. Code Ann. § 56-5-2953(B)(2007)(emphasis added). Additionally, the statute allowed 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).

Recently, this Court addressed whether a videotape complied with the statute. See State v. Henkel, 413 S.C. 9, 774 S.E.2d 458 (2015). This 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 15-16, 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, the question left unanswered in Henkel presents itself in this case. This is a novel question of law, and this Court should grant certiorari to provide guidance to the Bench, Bar, law enforcement to ensure the relevant parties comply with the dictates of the legislature. See Rule 242, B)(1), SCACR.

Plain meaning of the statute – As soon as practicable

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), the Court of Appeals 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." The Court defined "conduct" as one's behavior, action, or demeanor. Id.

In City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007), this Court held that a violation of the videotaping requirement of section 56-5-2953(A) may result in the dismissal of the charges if no exceptions apply. In light of the trial judge's order not addressing of the exceptions and the prosecution's failure to seek a ruling on the potential applicability of the statutory exceptions, this Court did not review the case to determine if any exceptions applied. Id. at 16-17, 646 S.E.2d at 880-881.

Recently, this Court examined the videotaping requirement of section 56-5-2953 in State v. Elwell, 403 S.C. 606, 743 S.E.2d 802 (2013). This Court concluded that if a person refuses a breath test, the officer is not required to videotape the twenty-minute pre-test waiting period. Id. In a companion case decided the same day, State v. Hercheck, 403 S.C. 597, 743 S.E.2d 798 (2013), this Court likewise concluded that law enforcement was not required to videotape the entire pre-test waiting period where the arrestee refused a breath test. This Court noted that the "'purpose of section 56-5-2953 is to create direct evidence of a DUI arrest.'" Id. (quoting Roberts, 393 S.C. at 347, 713 S.E.2d at 285). This Court found that when "an arrestee refuses the breath test, the evidence gathering portion is over." Id.

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 this 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. This 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.

The Court of Appeals' opinion in this case eviscerates the statutory requirement of videotaping by finding it inapplicable 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 the 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, the Court of Appeals' opinion further guts the statute. In arriving at this conclusion, the Court relied upon the 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. 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.

The record fails to support the conclusion that the officers were not aware of what they were investigating and as a result, the police were not considering the procedural rigors of DUI law as held by the Court of Appeals. The 911 calls in evidence provide ample support that the police were aware of a potential felony DUI prior to and upon their arrival. In Jones' call to 911, she informed the dispatcher that she saw a white man near a dead body and the white man was drunk. Additionally, Petitioner's father spoke to the 911 dispatcher and explained that he believed his son,

whom he identified by name, had hit the person who was lying in the road. The emergency calls alone placed officers on notice that a potential felony DUI was afoot.[6]

The first officer on the scene, Staggers, spoke to Petitioner within moments of his arrival. His initial observations of Petitioner were that Petitioner was unsteady on his feet – too unsteady to conduct field sobriety tests safely – and had "an odor of alcoholic beverages on his person." Staggers concluded quickly that Petitioner "had been drinking" and was the driver. R. 130, lines 10-15; R. 130, lines 19-23; R. 137, lines 19-20; R. 138, line 7. Recognizing the direction the investigation was taking, Staggers advised Petitioner of his rights. R. 130, line 24 – R. 131, line 3.

When Ballard arrived, he initially spoke to Staggers to obtain an update on the investigation thus far, and learned that Petitioner was driving the truck. R. 181, lines 21-24; R. 183, lines 13-17. Ballard observed Petitioner staggering. R. 183, lines 1-9. Ballard further testified that he was in communication with the dispatcher as evidenced by the 911 tape. R. 183, lines 18-21. Based on the observations made by police, information relayed to the 911 dispatcher, and statements allegedly made by Petitioner, Ballard charged Petitioner with DUI. R. 184, lines 23-25; R. 185, lines 2-5. Specifically, Ballard testified the charge was based upon Petitioner appearing highly intoxicated and telling Staggers he was driving. R. 188, lines 13-19.

When Boston arrived, which was shortly after Staggers arrived, he initially spoke to Staggers who relayed all information he had. Boston's understanding was that Petitioner was the driver of the truck that ran over Turner. R. 133, lines 17-23; R. 141, line 12 – R. 142, line 3.[7]

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[6] There is *no doubt* that Juan Ballard, one of the first officers on the scene and the officer who charged Petitioner 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.

[7] 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.

Boston immediately detected alcohol on Petitioner and noticed his speech was slurred. Boston opined that Petitioner was "very intoxicated." R. 144, lines 13-19. Boston also advised Petitioner of his rights. R. 141, lines 20-22. Thereafter, Boston, Staggers, and another officer took Petitioner to the police department and continued questioning. R. 145, lines 3-8. When the interrogation ended, Petitioner was charged with DUI and transported to the detention center. R. 147, lines 18-24. Boston based the DUI arrest on Petitioner's admission that he was drinking. R. 148, lines 2-17. According to Boston, "at first it was a DUI that kind of morphed into something else." R. 149, lines 6-8. Further, Boston testified that the deceased's head "looked like it had been run over by a tire." R. 173, lines 10-13.

Thus, the record fails to support the decision of the Court of Appeals that videotaping never became practicable because the officers were unaware they were investigating a DUI. As demonstrated, the officers had ample notice of the potential felony DUI on the scene, and in fact, arrested Petitioner for DUI within minutes of arriving. 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 Petitioner had been driving the truck present at the scene, (3) that Petitioner may have hit the person who was lying dead in the roadway, and (4) that Petitioner may have been drinking. Contrary to the Court of Appeals' 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 when the officers smelled alcohol on Petitioner and obtained admissions from Petitioner that he was drinking and

driving. By the time the officer first read Petitioner his rights, the officer knew or should have known that this was a DUI case and should have begun videotaping the incident site. There can be no doubt the officers were well aware they were investigating a potential DUI involving a fatality.

Additionally, the Court of Appeals held that because Petitioner was in Staggers's patrol car when Boston arrived, Petitioner "would not have been within camera range of a car-mounted camera." This is not supported by the record. Staggers testified to approaching Petitioner, advising him of his rights, and interrogating him. Staggers never indicated where Petitioner was during this encounter. R. 130, line 8 – R. 133, line 10. It seems unlikely that Petitioner was sitting in a patrol car during the entirety of the interrogation because Staggers claimed *repeatedly* that Petitioner was "unsteady on his feet." In order to make such an observation, Petitioner 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 Petitioner 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 Petitioner 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 Petitioner was immobile or that the cameras were immobile. The officers could have easily moved Petitioner to a position in which he would have been within range of a car-mounted camera. In fact, Ballard removed Petitioner from Staggers's patrol car so that the police chief could speak to Petitioner before Boston arrived. R. 182, line 22 – R. 183, line 4. If Petitioner 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, the 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.[8] 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 Petitioner within range of a forward facing only camera.

Statutory Exception

The Court of Appeals' 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.

The Court of Appeals 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, the 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"

[8] In State v. Henkel, 413 S.C. 9, 10 n. 2, 774 S.E.2d 458, 459 n.2 (2015), this 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.

language with the finding that the statutory videotaping requirement was "not applicable" demonstrates the Court of Appeals was not considering the statutory exception to the videotaping requirement.

Had the Court of Appeals reviewed the exception, the 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 Petitioner'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 Petitioner for DUI, *and only DUI*, within minutes of arriving. The state presented no evidence that videotaping the incident scene was impossible or impractical. The failure by law enforcement to create the video denied the jury the ability to assess Petitioner'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 Petitioner's intoxication or lack of intoxication, the video would have been the only objective evidence for the jury to make a determination concerning whether Petitioner engaged in felony DUI.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 1st day of February, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

George C. James, Jr., Circuit Court Judge

Opinion No. 2015-UP-311 (S.C. Ct. App. filed 6/24/2015)
10-GS-45-00269-00270.

THE STATE,

RESPONDENT,

V.

MARTY BAGGETT,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Marty Baggett #216091, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, and the S.C. Court of Appeals this 1st day of February, 2016.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of February, 2016

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

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February 1, 2016

William M. Blitch, Jr., Esquire
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: The State v. Marty Baggett

Dear William:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

SBH/smf

Enclosures

cc: Court of Appeals