STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Williamsburg County
Hon. George C. James, Jr., Circuit Court Judge
Appellate Case Tracking No. 2016-000093

The State, Respondent,

v.

Marty Baggett, Petitioner.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals correctly found initiation of the video recording was never practicable, and even if it became practicable, would not have accomplished the underlying purpose of Section 56-5-2953(A), so the trial court did not err in denying Petitioner's motion for a directed verdict.

STATEMENT OF THE CASE

Procedural History

The State agrees with Petitioner's procedural history within the Statement of the Case.

ARGUMENT

I. The Court of Appeals correctly found initiation of the video recording was never practicable, and even if it became practicable, would not have accomplished the underlying purpose of Section 56-5-2953(A), so the trial court did not err in denying Petitioner's motion for a directed verdict.

The Court of Appeals correctly found video recording of the incident scene never became practicable and, therefore, pursuant to Section 56-5-2953(B) of the South Carolina Code, the trial court properly refused to dismiss Petitioner's case.[1] First, there is ample evidence in the record to support the trial court's decision to deny the directed verdict as to felony DUI. To the extent the argument is for dismissal of the charge based on the failure to produce a video recording, Section 56-5-2953(B) contains an exception which allows the trial court to consider the totality of the circumstances regarding the failure to produce a video recording. The trial court in this case correctly determined the totality of the circumstances excused the failure to produce a videotape, and he correctly denied Appellant's motion for a directed verdict.

Directed Verdict

Appellant made a motion for directed verdict on the felony DUI charge. The trial court had ample evidence in the record supporting his decision to allow the charge to go forward to the jury. "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence

[1] As will be discussed below, Petitioner did not move to dismiss the case. Instead, he made a motion for directed verdict including a reference to the State's failure to provide a video recording.

and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Pursuant to section 56-5-2945 of the South Carolina Code (Supp. 2010):

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

The State presented testimony demonstrating Appellant was driving the vehicle. First, Officer Staggers testified Appellant was driving the vehicle. (T.153; R.130). Additionally, Investigator Boston indicated Appellant's first story was that Appellant was driving the vehicle. (T.213; R.177). Appellant's story changed to indicate the victim was driving the vehicle. Further, blood stains were found under the passenger door and material was located in the passenger wheel well indicating the victim was struck on the passenger side of the vehicle, and not the driver side, when she fell out of the truck. (T.88-90; 302; R.65-67; 256). The blood tested positive for the victim. (T.306-307; R.260-261).

Most significantly, Appellant has not challenged his conviction for reckless homicide. As a result, the jury's conclusion Appellant was driving in order to convict

him of reckless homicide is the law of the case. See S.C. Code Ann. § 56-5-2910(A) (Supp. 2010); State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002) (finding reckless homicide requires proof that the defendant (1) operated an automobile; (2) in reckless disregard for the safety of others; (3) the defendant's conduct proximately caused injury to the victim; and (4) within three years, the victim died as a result of these injuries).

Numerous witnesses testified Appellant was intoxicated both at the time of the discovery of the accident and at his arrest. Most significant is the testimony of Carolina Jones, the woman who first came across Appellant and the victim. She testified she came across the truck blocking the road and Appellant indicating he found a dead body. She asked him if he had called 911, and he said no. She testified he was "kind of drunk," "staggering around," and "repeating the same thing over again." She testified she believed he was under the influence of alcohol. (T.129-130; R.106-107).

Officer Staggers was one of the initial officers to arrive on scene. He testified he spoke with Appellant. He indicated Appellant "had a[n] odor of alcoholic beverages on his person. He had been drinking." (T.152-153; R. 129-130). He also testified Appellant was "unsteady on his feet." (T.160; R.137).

Investigator Boston arrived at the scene and also talked with Appellant. He indicated Appellant claimed to be too drunk to drive so the victim was driving. (T.177; R.143). Investigator Boston further testified he could smell alcohol on Appellant, Appellant's "speech was slurred," and Appellant was "slouched down in the back of the patrol car." He then stated: "I was advising him of his Miranda Warnings and he blurted out I know my rights and to me he was very intoxicated." (T.178; R.144). Investigator Boston testified based on his experience, Appellant was intoxicated. (T.179; R.145). He

indicated the basis for the original DUI charge against Appellant was Appellant's admission he was drinking. (T.182; R.148). Investigator Boston also took a statement from Appellant's father who described his son as "crazy and drunk." (T.189; R.153). Appellant's father then told Investigator Boston Appellant indicated "he had run over [the victim]." (T.189; R.153). Finally, Investigator Boston testified Appellant did not appear in shock at the scene of the homicide, instead he appeared intoxicated. (T.214; R.178).

The State presented evidence Appellant was driving the truck while intoxicated. The victim died as a result of Appellant's failure to exercise due care while driving intoxicated. The cause of death was found to be blunt force trauma from being run over. (T.259-261; R.222-224). As a result, the State presented sufficient evidence to sustain the trial court's decision to deny the motion for a directed verdict.

Dismissal for Failure to Produce Video

Appellant's main contention on appeal has been the felony DUI charge should have been dismissed because the State failed to provide a video recording of the incident scene pursuant to section 56-5-2953 of the South Carolina Code. At the incident site, the officers were not investigating a DUI, but were instead investigating a possible homicide. The Court of Appeals correctly determined, based on the totality of the circumstances which existed at the incident site, it was never practicable to begin video recording or to offer Appellant field sobriety tests. Finally, the Court of Appeals correctly found even if video recording became practicable, then it would have been a futile act and, therefore, not a basis for directed verdict of dismissal of the charges.

Pursuant to section 56-5-2953:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site videotaped.
>
> (1) The videotaping at the incident site must:
>
> (a) begin not later than the activation of the officer's blue lights and conclude after the arrest of the person for a violation of Section 56-5-2930, 56-5-2933, or a probable cause determination that the person violated Section 56-5-2945; and
> (b) include the person being advised of his Miranda rights before any field sobriety tests are administered, if the tests are administered.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2010).

Additionally, the statute provides:

> [I]n circumstances including, . . . traffic accident investigations . . . where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal. However, 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) (Supp. 2010).

First, Appellant moved for a directed verdict and not dismissal of the charges. The production of the video under section 56-5-2953(A) is not an element of the offense, and therefore, should not be a basis for the grant of a directed verdict. 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 maintains above, 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.

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.").

The testimony at trial, as well as the facts and circumstances of the scene, indicated the officers were investigating a homicide or accident and not a DUI. As the Court of Appeals and trial court both properly found, the totality of the circumstances excused the recording at the incident site. 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."). 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.").

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.[2] 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.[3] 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. Staggers, who was a corporal in the

[2] 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.

[3] The State acknowledges there is also evidence in the record indicating he told Staggers 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.

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. (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 then 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 Staggers 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. His testimony, specifically relied on by the trial court, 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, as a result, 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 investigation a possible homicide and so the video recording of the incident scene was not necessary.

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 no 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 Investigator Boston's 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. See State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015). 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 activated 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.

"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 this Court's recent opinion in Henkel, the State did not have to go back and do the Miranda warnings in front of the camera. Accordingly, the video recording would have shown nothing related to Appellant or the determination of his intoxication.[5] As discussed in Henkel, the video recording is relevant to establish

[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.

[5] Appellant contends the camera could have been turned to show Appellant in the back seat of the vehicle, and maintains there is no evidence the cameras were immobile. All arguments are purely speculative and without any support in the record. Further, the failure to fully develop the practicality of turning on the camera or turning it to face Appellant while in the vehicle is a result of Appellant moving for a directed verdict and not a pretrial motion to dismiss and not facts the State had to develop based on the trial court's ruling under the totality of the circumstances.

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. Accordingly, the Court of Appeals properly affirmed the trial court's determination that the failure of the State to produce a video recording should not result in dismissal of the case based on the totality of the circumstances. Therefore, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 23, 2016

RECEIVED

FEB 25 2016

SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Williamsburg County
Hon. George C. James, Jr., Circuit Court Judge
Appellate Case Tracking No. 2016-000093

The State, Respondent,

v.

Marty Baggett, Petitioner.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals 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
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served. This 23rd day of February, 2016.

SALLY ELLISON
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727