STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
AUG 23 2016
SC Court of Appeals

Appeal from Newberry County
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2016-001639

The State, Appellant,

vs.

Tony L. Kinard, Respondent.

MOTION TO HOLD APPEAL IN ABEYANCE AND REMAND TO CIRCUIT COURT FOR DISPOSITION OF MOTION FOR RECONSIDERATION

Appellant, through its undersigned counsel, would respectfully ask this Court for an order holding this appeal in abeyance and remanding the case to the Court of General Sessions for disposition of an outstanding Motion for Reconsideration. Undersigned counsel would respectfully show unto this Court:

I.

On June 8, 2016, the Honorable Donald B. Hocker considered Respondent's motion to dismiss his driving under the influence charge based on an alleged violation of the video recording statute, S.C. Code Ann. § 56-5-2953, of the South Carolina Code. Judge Hocker issued a verbal order dismissing the case and subsequently issued his written Order. Prior to receiving the signed order and based on Judge Hocker's oral ruling, the State filed a Motion to Reconsider on June 9, 2016 (See Attached Exhibit A). Judge Hocker considered the motion at a

hearing held on July 25, 2016. On the same date, Judge Hocker gave both parties a copy of the signed order resulting from the June hearing. (See Attached Exhibit B).[1] Judge Hocker took the motion under advisement at that time, and later requested a proposed order from Respondent's counsel.

The State prematurely served a Notice of Appeal from the July 25 Order of Judge Hocker on August 4, 2016. The Notice was served and filed prior to receiving an order regarding the State's outstanding Motion to Reconsider. The undersigned understands a proposed order has been prepared and transmitted to Judge Hocker for his signature once he has jurisdiction of this matter from this Court.

II.

In an effort to ensure the trial court has jurisdiction to entertain the Motion to Reconsider and issue its final order in this matter, undersigned counsel respectfully requests this Court hold this appeal in abeyance and remand this case to the Court of General Sessions for disposition of the Motion to Reconsider. Further, undersigned counsel respectfully requests an opportunity to file an Amended Notice of Appeal from any order resulting from the disposition of the Motion to Reconsider. Undersigned counsel discussed this matter with Respondent's trial counsel, who are making an appearance in this Court as Respondent's trial counsel for purposes of completing the trial record. Richard Dolce, Esquire and Michael Laubshire, Esquire have given their consent to this motion.

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[1] Respondent's counsel has an Order filed by the Clerk of Court on July 29, 2016, while the State is in possession of an Order with a filed date of August 4, 2016. The orders are identical except for the filing date with the Clerk of Court.

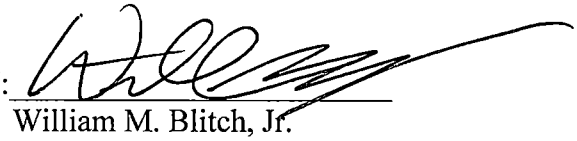
III.

WHEREFORE, the undersigned counsel requests an order remanding this case to the Court of General Sessions for disposition of the Motion to Reconsider. The undersigned further requests an opportunity to serve and file an Amended Notice of Appeal upon receipt of the written order disposing of the Motion to Reconsider. Finally, the undersigned asks this Court to hold all time periods and deadlines in this appeal in abeyance until such time as an Amended Notice of Appeal is served and filed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: 
William M. Blitch, Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 23, 2016

EXHIBIT A

STATE OF SOUTH CAROLINA)	**IN THE COURT OF GENERAL SESSIONS**
)	**EIGHTH JUDICIAL CIRCUIT**
COUNTY OF NEWBERRY)	
State of South Carolina,)	Indictment No.: 2016-GS-36-0107
)	
)	**NOTICE OF MOTION AND MOTION**
vs.)	**FOR RECONSIDERATION**
)	
Tony Latrell Kinard,)	
)	
Defendant.)	

FILED
NEWBERRY COUNTY
2016 JUN 9 PM 1 29
JACQUE S. BOWERS
CLERK OF COURT

YOU WILL PLEASE TAKE NOTICE that the State, by and through its undersigned counsel, will move before the Honorable Donald B. Hocker, as soon as the parties may be heard, for reconsideration of the dismissal of the above-captioned case.

The State's motion is based upon all admissible pleadings in the Court's file as well as the memorandum of law attached hereto.

Respectfully submitted this 9th day of June .2016.

STATE OF SOUTH CAROLINA)	**IN THE COURT OF GENERAL SESSIONS**
)	**EIGHTH JUDICIAL CIRCUIT**
COUNTY OF NEWBERRY)	
)	
State of South Carolina,)	Indictment No.: 2016-GS-36-0107
)	
)	**MEMORANDUM OF LAW IN**
vs.)	**SUPPORT OF STATE'S MOTION**
)	**FOR RECONSIDERATION**
Tony Latrell Kinard,)	
)	
Defendant.)	
)	

INTRODUCTION AND FACTS:

On or about November 3, 2015, South Carolina Highway Patrolman Mickey Barnett arrested the Defendant, Tony Latrell Kinard, for driving under the influence. It was later noted that Mr. Kinard had 6 prior DUI convictions. Following a thorough investigation, this case was brought before this Honorable Court for trial. On June 8, 2016 a jury was seated to try the above-referenced case.

At the outset of the trial counsel for the Defendant made an oral Motion to Dismiss the above-captioned case based on a violation of §56-5-2953(A)(1)(iii). Defendant claimed that the State failed to "show the person [Defendant] being advised of his Miranda rights." After a review of the video produced by the State, the Court dismissed the case based solely on the video evidence and narrow construction of the governing statute. After ruling on the Defendant's Motion to Dismiss the Court notably invited the State to file a Motion for Reconsideration on this narrow, legal issue.

On November 3, 2015, the Newberry County Sheriff's Department and Highway Patrol was dispatched to assist with a wreck on the westbound exit ramp of I-26 at exit 74. Deputy Snelgrove was the first law enforcement officer to arrive. Deputy Snelgrove's car was not equipped with a camera at the time. Deputy Snelgrove noted that he observed a black male shouting and angrily waving his hands in the air. Snelgrove attempted to calm this individual down but the man responded by "squaring off" with Snelgrove and taunting him with obscenities. The subject was identified as Tony Latrell Kinard and Deputy Snelgrove made the decision to place him under arrest for disorderly conduct.

A short time later South Carolina Highway Patrolman Mickey Barnett arrived and parked his car to the rear of Deputy Snelgrove's patrol vehicle. Barnett's in-car camera was activated and recorded the events that occurred in the immediate vicinity of Snelgrove's car. Barnett was briefed by Deputy Snelgrove of Mr. Kinard's actions prior to Barnett's arrival. After hearing Snelgrove's depiction and personally observing Mr. Kinard, Trooper Barnett made the decision to issue a ticket for Driving Under the Influence. Barnett's decision was based on the odor of alcohol on Kinard, Kinard's behavior, and open containers of liquor and beer found in Kinard's car. Barnett's in-car camera captured the Trooper at the side of Deputy Snelgrove's car and the Miranda instructions can very clearly be perceived.

APPLICABLE LAW AND ANALYSIS

Did the State fail to comply S.C. Code Ann. § 56-5-2953(A)(1)(iii)

At issue in this case is whether the State adequately met the requirements of "showing" that Defendant Kinard was properly advised of his Miranda rights. The State contends that Trooper Barnett's video provides more than adequate evidence that Defendant Kinard was clearly read his Miranda warnings as required by Section 56-5-2953. At pre-trial argument the Court equated the word "show" with the word "see". The ruling for dismissal was based on the fact that Defendant Kinard could not be seen while the Trooper was reading him his Miranda rights.

The State would assert that the Legislature clearly did not intend, by plain meaning of the statute, for the person being read his Miranda rights to be in constant, visible sight. If this had been the Legislature's intent, the statute would read that the "person being advised of his Miranda rights **must be seen**." The requirement to "show the person being advised of his Miranda rights" was enacted alongside the requirements to capture field sobriety testing. Field sobriety tests are usually a battery of physical exercises that may detect intoxication. Video recordings of these tests can allow a viewer to determine how well a person performs. Visual evidence is relevant in these tests. The ability to see the defendant is important because it is the performance of these tests that will objectively show how well or poorly the defendant carries out the instructions. What exactly would the viewer gain by looking at a defendant as he is read his Miranda warnings? It is not the visual of the defendant that is important. It is the content of the warnings, that they were administered and that they were administered properly that is of importance. The administration of Miranda warnings is a verbal and auditory function and the absence of a clearly visible

defendant or trooper during this exchange does not eviscerate what is otherwise the legislative intent to have Miranda shown. Legislative intent in enacting the requirement that the video "show the person being advised of his Miranda rights," contemplates that the video need offer proof that the person is informed of his Miranda rights.

"A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *State v. Sweat*, 379 SC 367, 376, 665 S.E.2d 645, 650 (Ct.App.2008). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Town of Mt. Pleasant v. Roberts*, 393 SC 332 at 342, 713 S.E.2d 278 at 283 (2011). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Id.* "Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *Id* at 342-43, 713 S.E.2d at 283.

Black's Law Dictionary defines "show" as "to make (facts, etc.) apparent or clear by evidence; to prove." The fact that Defendant Kinard was read his Miranda rights by Trooper Barnett is convincingly **apparent** and **clear** in the video produced by the State. Defendant Kinard is not visibly present on video recording at the exact time his Miranda rights were read however, when viewed as a whole, the video evidence clearly proves that he was present at the time of the reading and therefore was properly advised of his rights.

In the case at hand, Defendant Kinard has shown himself to be belligerent and aggressive before being placed in the back of Deputy Snelgrove's patrol car. If the Court interprets the above statute to require that he be "seen" while being read his Miranda warnings it would, in effect, have required that Trooper Barnett physically remove a potentially combative detainee from the car and have him stand on an exit ramp off of the interstate. Clearly, this would have been impractical, unadvisable and dangerous for both the Defendant and law enforcement. There are multiple reasons as to why this literal reading of the statute is impracticable including the following; an instance where a defendant is injured and placed in an ambulance prior to law enforcement arrival or the foreseeable likelihood of a Defendant running from the scene and having to be subdued some distance away from the car. It certainly would not be the intent of our Legislature to have the officer wrestle the man back to the camera before Miranda is offered (see *State v. Henkel*, 413 S.C. 9 (2015)).

Improper Dismissal Pursuant to S.C. Code Ann. § 56-5-2953(A)(1)(iii)

Even should the Court maintain that the law requires that a defendant actually be seen on a video while he is being read his Miranda rights, it is the State's assertion that a failure to depict this would not lead to the extreme result of an outright dismissal.

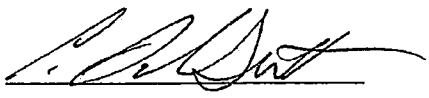
Non-compliance with the recording requirement is excusable and is not alone a ground for dismissal if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable and stating which reasonable efforts were made to maintain it; (2) if the arresting officer submits a sworn affidavit that it was physically impossible to produce the videotape because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) when an arrest is made and the camera has not been activated if video recording begins and conforms with the requirements as soon as practicable in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests; or (4) for any other valid reason for the failure to produce the video tape based upon the totality of the circumstances. §56-5-2953(B).

In the above case, the officers were responding to a traffic accident. It does not lead to a DUI investigation until after Mr. Kinard has been detained based on his unruly behavior. Had the State produced absolutely no video, the argument that the officer was responding to a traffic accident and exigent circumstances would apply. The analysis should be the same in a case where the State does produce a video. Officers were not dealing with a DUI case until after the defendant was in the car and the exigent circumstance of a combative defendant certainly contributed to the inability to offer him to the camera while warnings were administered.

In *State v. Gordon*, 414 S.C. 94 (2015), the depiction of the defendant's head during HGN testing was of poor quality and it had been argued that it was not sufficiently visible in the video. The Supreme Court ultimately ruled that requirement that the head be shown during the HGN test was satisfied but offered this, "Even if we assume that the video of a field sobriety test is of such poor quality that its admission is more prejudicial than probative, the remedy would not be to dismiss the DUI charge. Instead, the remedy would be to redact the field sobriety test from the video and exclude testimony about the test." *Id* at 100.

WHEREFORE, the State prays that the Circuit Court reconsider the matter raised herein and issue its order reversing its previous ruling to judicially dismiss Indictment 2016-GS-36-0107 on the basis of non-compliance of the video requirement in §56-5-2953(A)(1)(iii), and reinstate the charge so that the State may recall this matter at the next term of Newberry County General Sessions Court

Respectfully submitted this 9th day of June, 2016.



C. Dale Scott
Deputy Solicitor

EXHIBIT B

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF GENERAL SESSIONS**
	)	**FOR THE EIGHTH JUDICIAL CIRCUIT**
COUNTY OF NEWBERRY	)	
State of South Carolina,	)	
	)	Ticket No.(s): H390372 & H390373
	)	Indictment No.: 2016-GS-36-0107
v.	)	
Tony Latrell Kinard,	)	**ORDER**
Defendant.	)	

FILED
NEWBERRY COUNTY
2016 JUL 29 AM 11 43
JACKIE S. BOWERS
CLERK OF COURT

Date of Hearing:	June 7, 2016
Judge:	The Honorable Donald B. Hocker
Attorney for State:	Taylor Daniel and Dale Scott
Attorney for Defendant:	Michael Laubshire

This matter came before the Court on June 7, 2016, on the Defendant's motion to dismiss the charge of Driving Under the Influence, based upon the State's failure to comply with the mandatory videotaping requirement of S.C. Code Ann. §56-5-2953(A)(1)(a) iii) at the incident site. Present at the hearing was the Defendant and his attorney, Michael Laubshire, Taylor Danial, Assistant Solicitor for the Eighth Judicial Circuit and Dale Scott, Deputy Solicitor the Eighth Judicial Circuit, Trooper Burnett, South Carolina Highway Patrol and Deputy Snellgrove, Newberry County Sheriff's Office. As part of the hearing, the Defendant called witnesses, Trooper Burnett and Deputy Snellgrove and introduced into evidence the videotape from the incident site.

FINDING OF FACT

On or about November 3, 2015, at approximately 6:30pm, Trooper Barnett responded to a wreck on the I-26 west bound exit ramp at exit 74. Prior to his arrival on scene Trooper

Barnett activated his in-car video camera. Newberry County Deputy Snellgrove was already on scene and had detained the Defendant by placing him in handcuffs and in the rear of his patrol vehicle. The Defendant never physically appears on Trooper Burnett's at-scene video because he is handcuffed and in the rear of Trooper Snellgrove's car. Deputy Snellgrove does not have any recording of this incident because his vehicle was not equipped with a video camera. Deputy Snellgroves blue lights are flashing during the entire video making it difficult to see what is happening on the video. No field sobriety tests are conducted at the scene. The Defendant is never taken out of Deputy Snellgrove's vehicle, therefore, the arrest of the Defendant is not on the video and the Defendant is not shown being advised of his Miranda Rights.

CONCLUSIONS OF LAW

Pursuant to the provisions of S.C. Code Ann. §56-5-2953, as amended, a person charged with driving under the influence must have their conduct recorded as follows:

> S.C. Code Ann §56-5-2953: Incident site and breath test site video recording
> (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 video recorded.
> (1)(a) The video recording at the incident site must:
> (i) not begin later than the activation of the officer's blue lights;
> (ii) include any field sobriety tests administered; and
> **(iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.**
> (b) A refusal to take a field sobriety test does not constitute disobeying a police command.
> (2) The video recording at the breath test site must:
> (a) include the entire breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test;
> (b) include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test; and

(c) also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video record this waiting period.

(3) The video recordings of the incident site and of the breath test site are admissible pursuant to the South Carolina Rules of Evidence in a criminal, administrative, or civil proceeding by any party to the action.

(B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

HISTORY: 1998 Act No. 434, Section 9; 2000 Act No. 390, Section 23; 2003 Act No. 61, Section 8; 2008 Act No. 201, Section 11, eff February 10, 2009.

The Statutory construction of this section has been litigated extensively throughout South Carolina. In constructing the terms of a statue, the primary rule of statutory construction is that a statute should be construed to give the effect to the intent of the legislature. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E. 2d 278 (2011); City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007); and State v. Johnson, 393 S.C. 182, 720 S.E.2d 516 (Ct. App.

#3

not include the arrest of the defendant nor did it show the Defendant being advised of his Miranda rights. There is nothing in the record to suggest that S.C. Code Ann. §56-5-2953 subsection (B) applies since a video tape from the arresting officer was produced and began recording prior to his arrival on scene. The Defendant was in the back seat of Deputy Snellgrove's patrol car when Trooper Burnett places him under arrest and advises him of his Miranda rights. The rights can be heard but the Defendant is not visible and because of the flashing blue lights on Deputy Snellgrove's patrol car the trooper is barely visible. Trooper Burnett testified he was standing in the apex of the door when he read the Defendant his rights.

Since there is no evidence of a S.C. Code Ann. §56-5-2953 subsection (B) exception, the appropriate remedy for the violation of section (A) of this statute is dismissal of the charge. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (S.C. 2011); The Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011); State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (S.C. 2012).

IT IS THEREFORE ORDERED that:

That based upon the above stated findings of fact and conclusions of law, the Court hereby dismisses this matter.

IT IS SO ORDERED!

7-25, 2016
Lancaster, South Carolina

Donald B. Hocker

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RECEIVED
AUG 23 2016
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2016-001639

The State, Appellant,

vs.

Tony L. Kinard, Respondent.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the Motion to Hold Appeal in Abeyance and Remand to Circuit Court for Disposition of Motion For Reconsideration on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

Michael V. Laubshire, Esquire
455 St. Andrews Road, Suite E-1
Columbia, South Carolina 29210-4487

Richard J. Dolce, Esquire
Post Office Box 4403
Irmo, South Carolina 29063

I further certify that all parties required by Rule to be served have been served.

This 23rd day of August, 2016.

Sally Ellison

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

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
AUG 23 2016
SC Court of Appeals

August 23, 2016

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Tony L. Kinard

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of a Motion to Hold Appeal in Abeyance and Remand to Circuit Court for Disposition of Motion For Reconsideration along with proof of service for filing in the above-referenced appeal.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General

Enclosures
cc: Michael V. Laubshire, Esquire
Richard J. Dolce, Esquire
Victim Services