

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

IN THE COURT OF GENERAL SESSIONS
FOR THE EIGHTH JUDICIAL CIRCUIT

State of South Carolina,)
)
v.)
)
Tony Latrell Kinard,)
)
Defendant.)
_____)


Indictment No. 2016-GS-36-0107

ORDER

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SC Court of Appeals

Date of Hearing: July 25, 2016
Presiding Judge:  ~~The Honorable~~ Donald B. Hocker
Attorney for State: Assistant Solicitor Taylor Daniel
Attorney for Defendant: Michael V. Laubshire
Court Reporter: Margaret Woods

This matter comes before me on the State's Motion for Reconsideration of my June 8, 2016¹ verbal order and subsequent July 25, 2016 written order dismissing the above-captioned indictment based on the factual circumstances of the case and the provisions of Section 56-5-2953, South Carolina Code of Laws, 1976 (as amended) (which hereinafter may be referred to as, "the statute'.) At the call of the case, present before the Court are Assistant Solicitor Taylor Daniel on behalf of the State and Michael Laubshire, assisted by Richard J. Dolce, on behalf of the Defendant. I note that the Defendant was also present for the hearing.

As a preliminary matter, at the call of the case, the Defense took the position that the State's Motion for Reconsideration had not been properly signed or served in accordance with the South Carolina Rules of Civil and Criminal Procedure. However, the Defense also stipulated that, upon the proper signing of the Motion by the Assistant Solicitor, it would accept personal service of the Motion by him and waive any notice period so as to allow the hearing on the State's Motion for Reconsideration to take place as scheduled. This was accomplished.

With that matter resolved, the hearing on the State's Motion for Reconsideration of my previous orders proceeded. I note that during the hearing I allowed both the State and the

¹ In my July 25, 2016 written order the date of the hearing of the case and my verbal order concerning it was incorrectly shown as June 7, 2016. The correct date of the hearing and that verbal order was June 8, 2016, as has been verified with the Office of the Clerk of Court of Newberry County.



Defense considerable latitude in presenting their position to me. I allowed, over the objections of the Defense, the State to present for my consideration documents that were not presented and to raise issues that were not raised during the June 8, 2016 hearing on the Defense Motion to Dismiss. My purpose in doing so was to allow both sides the opportunity to fully present to me their view of what I should consider in reaching my decision in this matter.

Discussion

1. As set forth in more detail herein, after careful consideration of the arguments presented by both parties, I am denying the State's Motion for Reconsideration. To the extent that my July 25, 2016 order sets forth my Findings of Fact and Conclusions of Law concerning the Defense's Motion for Dismissal in this matter, those findings and conclusions are incorporated and included herein.

2. The State frames the primary issue in its Motion for Reconsideration as follows:

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

The State then asserts that one can see Trooper Barnett reading Miranda rights while the Defendant was sitting in the back of Deputy Snelgrove's car. In its Motion, the State goes on to assert that:

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 the 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 and therefore was properly advised of his rights. (Emphasis in the original).

The State further goes on to assert that, "Black's Law Dictionary defines 'show' as 'to make (facts, etc.) apparent or clear by evidence; to prove.'" The State also argues that:

the Defendant Kinard, "... had shown himself to be belligerent and aggressive before being placed in the back of Deputy Snelgrove's car. If the Court interprets [the statute] to require that he been '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

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stand on an exit ramp off of the interstate. Clearly this would have been impracticable, inadvisable and dangerous for both the Defendant and law enforcement.”

The State goes on to argue:

There are multiple reasons as to why this literal reading of the statute is impractical, including the following: an incident wherein the Defendant is injured and placed in an ambulance prior to law enforcement arrival or the foreseeable likelihood of the Defendant running from the scene and having to be subdued some distance away from the car.

3. In its common use in the English language the word “show” can take on many forms. It may be a noun as, for example, a demonstrative display such as “show strength,” or as a display arranged to arouse interest or stimulate sales, or even as a radio or television program. The word may also be verb, as in “to cause or permit to be seen” or to “display for the notice of others,” or “to reveal by one’s condition, nature or behavior.” (Webster’s Ninth New Collegiate Dictionary). In the context of the statute at issue, the word “show” is clearly used as a verb, and therefore can be interpreted as meaning, “to cause or permit to be seen.” The State concedes that, “ — the Defendant was not visibly present on the video recording at the exact time his Miranda Rights were read.” In fact the Defendant was not visibly present at any time in the video recording presented by the State. Therefore, I conclude that, in the context of this statute at issue, the word “show” in the phrase, “... and show the person being advised of his Miranda rights ...” (SC Code of Laws, Section 56-5-2953(A)(1)(a)(iii) (1976 as amended)) means to cause or to permit the person being advised of his Miranda rights to be seen. This interpretation is consistent in the entire context of the statute, and with the Circuit Court cases and Appellate Cases presented to me by the Defense, all of which include the requirement that the defendant’s entire body be seen in the video made during the arrest and testing process.

4. In response to my question as to whether, if the video did not properly show the Defendant being told his Miranda rights, there was any alternative other than to dismiss the case, the State replied that the proper alternative would be to suppress the video. The Appellate courts have not required the video recording to be “perfect.” The fact that a part of the video is blurred or poor quality might not be enough to cause a dismissal of the case, as for example was the situation in State v. Gordon, 414 S.C. 94 (2015). The appropriate remedy in that situation was determined to be, at worst (from the State’s point of view), the suppression of the video. However, in Gordon there was a video in which a person who can be clearly seen as being the

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Defendant was visible while undergoing field sobriety testing. In this case, all that can be seen on the video is the Trooper standing at the door of the deputy's car and reading Miranda rights. As stated above, the Defendant, who is said to be in the back seat of the Deputy's car, is not in any way visible.

5. It is clear that the purpose of the video recording provision of the statute is to create direct evidence of the arrest and testing process so as to allow the finder of fact to view that process and make an independent decision as to whether or not the advisement of Miranda rights was properly administered, acknowledged, and understood and that the testing process was properly administered and properly performed. It is also clear this video does not "cause or permit to be seen" the Defendant while he is being advised of his Miranda rights and therefore does not provide the opportunity to make such an independent decision.

6. During the course of argument on the Motion for Reconsideration, I questioned the State as to whether or not either the Deputy or the Trooper had offered to assist the Defendant in getting out of the car so that he could be visible on the video while being read his Miranda rights. In the hearing on the Motion to Dismiss, there was testimony that the Defendant earlier had been belligerent and combative, and there was testimony that the Trooper observed the Defendant to have a, "1,000 mile stare," but there is no testimony concerning his demeanor and attitude at the time the Trooper could be seen reading the Miranda rights advisement. The audio portion of the video recording indicates that the Defendant does not respond to the Trooper's questions concerning the Miranda rights advisement. Without being able to see the Defendant on the video it is not possible to determine if he actually heard and understood his Miranda rights. I conclude that the legislative intent of the statute is that the defendant be visible on the video recording during the whole process of a DUI arrest, including the reading of the Defendant's Miranda rights and the field sobriety tests (if any). I therefore conclude that allowing a video recording in which only the Trooper can be seen during reading to the Defendant of his Miranda rights would lead to an interpretation of the statute that would, "... lead to a result so plainly absurd that it would not have been intended by the Legislature or would defeat the plain legislative intention." Mt. Pleasant v. Roberts, 393 S.C. 332 at 342-343, 713 S.E. 2d 278 at 283 (2011).

7. Concerning the issue of the risk and or danger that might have been involved in "forcing" the defendant out of the car so that he could be seen on video, there is no evidence in

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this case that, at the time the Trooper recited the Miranda rights, the Defendant would have continued to be uncooperative and present a threat to the law enforcement officers or to himself. While it is certainly possible that in a similar situation there may be a Defendant that continues to be belligerent or uncooperative, this case is limited by the facts presented, and those facts do not shed any light on the Defendant's lack of willingness to cooperate in the proper video recording of the Miranda warning sequence. There is, in this case, no evidence that the Trooper would have had to, " — wrestle the man back to the camera before Miranda is offered" as posited in the States' Motion before me at this hearing.

8. The State cites the exigent circumstances provision of Section 56-5-2953(B) as allowing the case to proceed with the existing video. My previous ruling on this issue is that, because a video recording exists in this matter, Section 56-5-2953(B) does not apply. However, even assuming that it did apply, and that exigent circumstances existed such that the officers believed that attempting to remove the defendant from the back of the deputy's vehicle so that he could be fully seen on the videotape receiving his Miranda rights warning was not feasible or too dangerous, no affidavit was submitted by the officers concerning those circumstances as required by the statute. Further, as noted above, there was no evidence to support the contention that the defendant was in fact unruly, combative or uncooperative at the time that the Trooper read the Miranda rights.

9. In its argument, the State cites the case State v. Henkel, 413 S.C. 9, 744, S.E. 2d 248 (2015) wherein the South Carolina Supreme Court granted the State's petition for a Writ of Certiorari to review the Court of Appeals' opinion that found that the trial court should have dismissed Defendant's DUI charge because the videotape did not comply with the statutory requirements for videotaping the Defendant's conduct at the scene of his DUI arrest. The factual situation in that case was that a vehicle had been observed driving erratically and ultimately wrecking. When police responded to the wreck, they learned from a witness that the driver had fled from the scene. Several hours later, the driver was located and, when the police arrived, was receiving medical care in an ambulance. The while the Defendant was in the ambulance, the arresting officer administered the Miranda rights advisement to him and conducted a field sobriety test, both of which were captured on an audio recording device, but not a video recording device. However, after later in the arrest sequence, the defendant was placed in the

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arresting officer's patrol vehicle. The in-car camera was faced towards him, and the officer read the defendant his Miranda rights again, all of which was recorded by the camera. The trial court denied the Defendant's motion to dismiss, recognizing that this incident was not a typical DUI stop, and that the officer's investigation began hours after the wreck. The South Carolina Court of Appeals reversed, finding that the DUI charge should have been dismissed because the videotape did not comply with statutory requirements for videotaping respondent's conduct at the time of his DUI arrest. The case was decided under the statute as in existed in January, 2008. Under the facts of the case, the Court concluded that the Miranda rights advisement was given prior to the time that video recording became practicable. In the case at hand, video recording began as soon as the Trooper arrived, which was before the Miranda rights advisement to the Defendant was conducted. Thus, the arrival of the Trooper is the time that the video recording became practicable. Once video recording becomes practicable, the video recording then must comply with Subsection (A) of the statute. ("We find the language of the exception in subsection (B) ambiguous and construe the exception to require compliance with subsection (A) when it becomes practicable to begin videotaping." Henkel, 774S.E.2d at 461). In this case, after video recording became practicable, the Miranda warnings were given but not recorded in compliance with the requirements of Subsection (A). I note that the statute was amended in 2009, but the amendments did not alter the requirement that once the video recording starts, full compliance with Subsection (A) is required.

9. I also reviewed State v. Manning, 734 S.E. 2d 314, 400 S.C. 257 (2012) which was cited by the State. In that case, at the time the investigating officers arrived, the Defendant had been taken to the hospital. Therefore, there were no field sobriety tests or Miranda warnings to be given at the accident site and Subsection (A) was inapplicable because the investigating officer and the defendant were never simultaneously present at the accident site, and therefore there was nothing to record. The fact that Subsection (A) was not applicable then allowed the Court to consider the exceptions in Subsection (B). However, again, in this case, Subsection (A) is applicable because, without dispute, video recording was practicable and began as soon as the arresting officer arrived. I therefore conclude that Manning is not helpful to the State's argument concerning compliance with Subsection (A) or the ability to utilize exceptions as set forth in Subsection (B) of the statute.

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10. Based on the above, and based on the findings of fact and conclusions of law in my previous order in this matter, I conclude that the Section 56-5-2953(B) exceptions are not applicable in this matter, and that there is no evidence to support an argument that they would or should be. I further conclude that the video recording did not comply with the requirement of Section 56-5-2953 (A) that the Defendant be shown receiving his Miranda rights on the video recording that was made. I therefore conclude that the appropriate remedy, as previously set forth in my June 7, 2016 verbal order and my July 25, 2016 written order, is dismissal of the case. 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 SO ORDERED!



Donald B. Hocker
Judge, 8th Judicial Circuit

10-20, 2016
Lawrence, SC

Laubshire Kinard case/Order1

