

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

MAY 19 2016

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS
Case No. 2014-CP-46-00239

SC Court of Appeals

JOHN C. HAYES, III, Circuit Court Judge

Appellate Case No. 2014-002340

City Of Rock Hill.....Appellant

v.

Brenda Stroupe.....Respondent

APPELLANT'S FINAL REPLY BRIEF

Jason M. Weil
Christopher E. A. Barton
201 E Main Street, 3rd Floor
Rock Hill, South Carolina 29730
(803) 329-8783
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of Common Pleas
Case No. 2014-CP-46-000239

JOHN C. HAYES, III, Circuit Court Judge

Appellate Case No. 2014-002340

City of Rock Hill,

Appellant,

v.

Brenda Stroupe,

Respondent.

FINAL REPLY BRIEF OF APPELLANT

CHRISTOPHER E. A. BARTON
Senior City Solicitor
S.C. Bar No. 65261

201 E. Main Street, 3rd Floor
Rock Hill, SC 29730
(803) 329-5619

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATE OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....2

FACTS.....3

ARGUMENT.....6

 I. THE CIRCUIT COURT ERRED IN FINDING THAT THE INCIDENT SITE VIDEO RECORDING DID NOT COMPLY WITH THE REQUIREMENTS OF SECTION 56-5-2953(A) OF THE SOUTH CAROLINA CODE OF LAWS WHERE IT IGNORED THE FACTUAL FINDINGS TO THE TRIAL COURT.....6

 II. THE APPROPRIATE REMEDY FOR A POOR QUALITY VIDEO IS REDACTION OF THE FIELD SOBRIETY TEST AND EXCLUSION OF THE TESTIMONY REGARDING THE RESULTS OF THE TEST9

 A. THERE WAS OVERWHELMING EVIDENCE OF RESPONDENT’S GUILT EVEN WITH SUPPRESSION OF THE FIELD SOBRIETY TESTS AND REDACTION OF THE VIDEO9

 III. THE CIRCUIT COURT ERRED IN FINDING THAT SECTION 56-5-2953(B) OF THE SOUTH CAROLINA CODE OF LAWS DID NOT APPLY WHERE THE ARRESTING OFFICER SUBMITTED AN AFFIDAVIT DOCUMENTING THE CIRCUMSTANCES ENCOUNTERED AT THE TIME THE INCIDENT SITE VIDEO WAS RECORDED.....11

 A. THE CIRCUIT COURT ERRED IN HOLDING THAT THE CITY OF ROCK HILL AS RESPONDENT ON APPEAL BEFORE THE CIRCUIT COURT COULD NOT ARGUE ON APPEAL ADDITIONAL REASONS FOR AFFIRMING THE TRIAL COURT EVEN IF THOSE REASONS WERE NOT PRESENTED TO OR RULED ON BY THE TRIAL COURT.....12

CONCLUSION.....13

TABLE OF AUTHORITIES

CASES

City of Aiken v. Koontz, 368 S.C. 542, 629 S.E.2d 686 (Ct. App. 2006) 6

State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004) 7

State v. Gordon, 414 S.C. 94, 777 S.E.2d 376 (2015) 7, 8, 9

S.C. DOL v. Chastain, 392 S.C. 259, 708 S.E.2d 818 (Ct. App. 2011) 13

STATEMENT OF THE ISSUES ON APPEAL

- I. The circuit court erred in finding that the incident site video recording did not comply with the requirements of section 56-5-2953 of the South Carolina Code of Laws where it ignored the factual findings of the trial court.
- II. The circuit court erred in dismissing the charge after the production of the incident site video recording. The appropriate remedy for a poor quality video is redaction of the field sobriety test and exclusion of testimony regarding the results of the test.
 - a. There was overwhelming evidence of Respondent's guilt even with suppression of the field sobriety tests and redaction of the video.
- III. The circuit court erred in finding that section 56-5-2953(B) of the South Carolina Code of Laws did not apply where the arresting officer submitted an affidavit documenting the circumstances encountered at the time the incident site video was recorded.
 - a. The circuit court erred in holding that the City of Rock Hill as Respondent on appeal before the circuit court could not argue on appeal additional reasons for affirming the trial court, even if those reasons were not presented to or ruled on by the trial court.

STATEMENT OF THE CASE

Respondent was arrested for driving under the influence in the City of Rock Hill, South Carolina. Prior to trial the Respondent moved to dismiss the charge on the ground that the Appellant failed to comply with the recording provisions of Section 56-5-2953 of the South Carolina Code of Laws. The Appellant filed a response to the motion to dismiss on October 21, 2013. A hearing on the motion to dismiss was held on October 26, 2013 and the municipal court issued an order denying the motion to dismiss on October 28, 2013. Following the denial of the motion to dismiss, the case proceeded to a jury trial on January 23, 2014. The result was the jury found the Respondent guilty of driving under the influence and then determined that her blood alcohol content was a .16% or greater in a separate second verdict form.

On January 24, 2014, the Respondent filed a timely Notice of Appeal from her conviction. The appeal was heard by the Honorable John C. Hayes, III, on September 3, 2014. By order dated September 15, 2014 and filed September 19, 2014, Judge Hayes reversed the ruling of the trial court, dismissed the charge and granted Respondent's appeal. Appellant subsequently filed a timely Rule 59 Motion to Alter or Amend Judgment on October 1, 2014, which was denied by the circuit court in an order dated October 7, 2014.

The City of Rock Hill filed a timely Notice of Appeal from the rulings of the circuit court. This appeal follows.

STATEMENT OF FACTS

On April 13, 2013, Brenda M. Stroupe (Respondent) was charged with Driving Under the Influence (S.C. Code § 56-5-2930) following a call from Adam Rainey, a concerned citizen, that led Rock Hill officers to her location. Mr. Rainey reported that a maroon Mitsubishi Eclipse was driving recklessly in the area of Red River Road in Rock Hill and at times, driving on the wrong side of the road. Mr. Rainey's information and vehicle description were relayed by a Rock Hill Police Department dispatcher to Officer Justin Lewis who responded to the location where Red River Road becomes Cel-River Road. (R, pp. 20-21)

Officer Lewis came in contact with the vehicle near the intersection of Cel-River Road and Cherry Road at approximately 7:37 pm. Officer Lewis fell in behind the vehicle and followed the vehicle to the intersection of Cel-River Road and Cherry Road. The vehicle was the first vehicle stopped at the red light and then began to proceed through the intersection on Cherry Road heading west while the traffic light was still red. Officer Lewis then activated his blue lights to initiate a traffic stop. (R. p. 21)

Following Officer Lewis activating his blue lights, the driver of the vehicle proceeded down Cherry Road heading towards I-77. The vehicle was eventually stopped a short distance from the intersection of Cherry Road and Cel-River Road near I-77 within the city limits of Rock Hill. Officer Lewis made contact with the Respondent who was the driver and sole occupant of the vehicle. Upon speaking with the Respondent, Officer Lewis believed that she may be impaired and contacted Officer Justin Cook with the Rock Hill Police Department Traffic Unit to assist. (R, p. 21)

Officer Cook arrived on scene at approximately 7:46 p.m. and spoke with Officer Lewis to review the matter and then spoke with the Respondent. (R. p. 206, line 23, R. p. 207, lines 1-

4, R. p. 220, lines 23-25, R. p. 221, line 1) Upon speaking with the Respondent, Officer Cook detected a strong smell of alcoholic beverage coming from her as she was leaning on the back of a patrol vehicle. (R. p. 221, lines 4-6). Officer Cook noted that the Respondent's eyes were bloodshot and glassy and that her speech was slurred. (R. p. 204, line 22 and R. p. 221, lines 2-4) Officer Cook asked the Respondent how much she had been drinking and she replied that she had one mixed drink earlier at her mother's house. Officer Cook then proceeded to offer the Respondent some field sobriety tests which the Respondent agreed to do. (R, p. 221, lines 9-12)

Officer Cook offered the Horizontal Gaze Nystagmus test and noted that all six clues were present. (R, p. 240, line 6) Due to the Respondent's stated physical impairments, Officer Cook offered the Respondent the Finger Dexterity test in lieu of the Walk and Turn and One Leg Stand tests. (R. p. 241, lines 15-16) Lastly, Officer Cook requested the Respondent to recite the alphabet from D to X after confirming that the Respondent knew the alphabet. (R, p. 243, lines 6-10)

Based on the observations related to Officer Cook and his direct observations, he placed the Respondent under arrest for DUI and read a Miranda warning to her. The entire interaction at the incident site between the Rock Hill Police officers and Respondent was video recorded. (R. p. 20

Following her arrest, the Respondent was transported to the Rock Hill Law Center and offered a breath test. The Respondent registered a 0.23% blood alcohol content and was served with a notice of suspension of her driving privileges due to her blood alcohol content. She was issued Uniform Traffic Ticket number 48264 GH charging her with Driving Under the Influence. (R, p. 20 and R. p. 260, line 10)

The Respondent proceeded to a two day jury trial and following the submission of the case to the jury, the jury deliberated for approximately five (5) minutes before returning with a finding of guilt. Subsequently, the jury was charged to determine the Defendant's blood alcohol content (BAC) and the jury found the BAC to be in excess of 0.16%. (R, p. 22)

The Respondent filed a timely appeal of her conviction and the circuit court issued an order reversing the conviction, dismissing the case and subsequently denied Appellant's Rule 59 motion to alter or amend judgment. This appeal follows.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE INCIDENT SITE VIDEO RECORDING DID NOT COMPLY WITH THE REQUIREMENTS OF SECTION 56-5-2953(A) OF THE SOUTH CAROLINA CODE OF LAWS WHERE IT IGNORED THE FACTUAL FINDINGS OF THE TRIAL COURT.

The trial court found “that the Defendant’s conduct was captured on one or more videos at the time of her performing the HGN, Finger Dexterity and Alphabet Test. Any issues with the clarity of the video goes to their weight and not to their admissibility.” (R, p. 39) The trial court went on to deny Respondent’s motion to dismiss the case for a failure to produce the video recordings required by Section 56-5-2953 of the South Carolina Code of Laws. (R, p. 39)

On appeal the circuit court found “in this case, the video shows only the administering of the Horizontal Gaze Nystagmus test, Vertical Gaze Nystagmus Test, and the finger dexterity test. However, the video fails to show the Appellant’s [Stroupe’s] performance on either of the nystagmus tests or the finger dexterity test.” (R, p. 89)

Both the trial court and the circuit court sitting as the initial appellate court in this matter found that a video was produced and the video shows the administration of the field sobriety tests. That should have been the end of the inquiry for the circuit court, as the circuit court found there was evidence to support the ruling of the trial court.

“In criminal appeals from a municipal court, a circuit court does not conduct a de novo review, but instead reviews for preserved error raised to it by appropriate exception.” City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct. App. 2006). The factual rulings of the municipal court are given great deference on appeal and “in criminal cases, the court of appeals sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous.” Id.

The factual findings of the trial court are supported by the evidence in this case, which the trial court was in the best position to evaluate. The factual findings of the trial court following an extensive pre-trial hearing finding that video recordings were made of field sobriety tests is supported by the evidence. The incident site video recordings in this case speak for themselves. (R, p. 23)

On appeal, an appellate court is bound by the trial courts factual findings unless they are clearly erroneous. “This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. The appellate court does not re-evaluate the facts based on its own review of the preponderance of the evidence, but simply determines whether the trial judge’s ruling is supported by any evidence.” State v. Wood, 362 S.C. 520, 526, 608 S.E.2d 435, 439 (Ct. App. 2004).

The trial courts factual finding that the video recordings created by the City of Rock Hill police officers at the incident site satisfy the requirements of Section 56-5-2953 is not clearly erroneous and is supported by the evidence and supported by the finding of the circuit court on appeal. (R, pp. 37-39). The circuit court erred when it added the additional requirement that the performance of the Respondent be shown on the video recording, although such performance does not need to include the Respondent’s eyes being visible. (See, footnote 3 of the Order Granting Relief from the circuit court) (R, p. 89)

State v. Gordon, 414 S.C. 94, 777 S.E.2d 376 (2015) found that the trial court properly admitted the results of a horizontal gaze nystagmus (HGN) field sobriety test where the video recording showed the motorist’s head and per se dismissal of the driving under the influence charge was inappropriate.

The Gordon court found that the “statute states that the video recording must include the field sobriety tests administered, which necessarily includes the HGN test.” Id. at 100. (internal quotes omitted). Gordon found that the HGN test was properly recorded where Gordon’s face was depicted on the video and the actions of the officer in administering the test are visible and the officer’s instructions audible.

Gordon held that section 56-5-2953 requires the administration of the field sobriety tests to be recorded but not necessarily the performance of the individual. “Since the focus of the HGN test is the movement of the eyes, the jury would not have been able to determine if Gordon passed or failed by simply looking at this video. Moreover, the viewing of a video of an HGN field sobriety test has very little probative value to a jury because the eyes of the motorist are rarely, if ever, seen.” Id. at 101.

The trial court’s factual finding that the incident site video recording captured the conduct of the Respondent is supported by the evidence, most notably the video itself. (R, p. 23). The video recording shows Officer Cook administering the field sobriety tests to the Respondent and there is no dispute that the audio portion can be clearly heard. (R, p. 38). The dismissal of the case on appeal by the circuit court, following production of the incident site video recordings by the City of Rock Hill police officers was error.

II. THE CIRCUIT COURT ERRED IN DISMISSING THE CHARGE AFTER THE PRODUCTION OF THE INCIDENT SITE VIDEO RECORDING. THE APPROPRIATE REMEDY FOR A POOR QUALITY VIDEO IS REDACTION OF THE FIELD SOBRIETY TEST AND EXCLUSION OF TESTIMONY REGARDING THE RESULTS OF THE TEST.

Both the trial court and the circuit court found that Appellant produced an incident site video recording of the Respondent that included the administration of the field sobriety tests. (R, pp. 37-39 and R, p. 89)

However, the circuit court went on to hold that the Respondent's performance on the HGN, VGN and finger dexterity tests was not shown and as such dismissal of the case was the only remedy. (R, p. 90) The circuit court's ruling runs contrary to the South Carolina Supreme Court's position in State v. Gordon, 414 S.C. 94, 777 S.E.2d 376 (2015). Gordon found that once the required video recording is produced any issues regarding the quality of the recording should be addressed by redaction and suppression of those portions of the video recording where the probative value is outweighed by the prejudicial effect. "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 101.

A. THERE WAS OVERWHELMING EVIDENCE OF RESPONDENT'S GUILT EVEN WITH SUPPRESSION OF THE FIELD SOBRIETY TESTS AND REDACTION OF THE VIDEO.

Assuming that remedy of redaction and suppression was necessary in this case, even without the results of the HGN, VGN and finger dexterity tests, there is still overwhelming evidence of the Respondent's guilt.

Her initial bad driving was testified to by the eyewitness who called 911 to report that a red vehicle was speeding up and slowing down traveling as slow as 15 mph in a 45 mph zone.

He further testified that while traveling directly behind the vehicle he observed it drift into the oncoming lane of traffic on several occasions requiring the oncoming vehicles to take evasive action to avoid a collision. (R, p. 20)

Officer Justin Lewis testified that he responded to the 911 dispatch and located the same vehicle just shortly after the initial 911 call. He observed the vehicle stopped at a red light and while directly behind the vehicle, Respondent drove her vehicle into the intersection while the light was still red. Officer Lewis's in-car video also showed the same actions (R, p. 21 and p. 207, line 20) Officer Lewis also testified that he conducted a traffic stop of the vehicle just east of I-77 and noticed that the Respondent had glassy eyes and smelled of alcohol. (R, p. 21 and p. 204, line 22)

Officer Cook arrived on the scene and began his investigation by speaking the Respondent. Officer Justin Cook testified that he had no doubt that the Respondent was impaired. She had glassy, blood shot eyes and an odor of alcohol coming from her. (R, p. 20) The Respondent performed poorly on the alphabet test. When asked to recite the alphabet from D through X Respondent stated "D, F, U, V, W, X, Y, Z." (R, p. 244, lines 11-12). Respondent subsequently provided a breath sample on the DataMaster DMT which indicated her blood alcohol content was .23%. (R, p. 21 and R. p. 257, line 20).

The DataMaster DMT result was proven to be reliable. Special Agent Randy Brown from the South Carolina Law Enforcement Division testified that he is assigned to the Implied Consent Division and was qualified as an expert in the area of the DataMaster and breath alcohol testing. Special Agent Brown testified that the DataMaster used in this case was functioning properly and accurately. He also testified that Officer Cook followed the appropriate breath testing procedures. (R, p. 22).

The jury had the opportunity to directly observe the demeanor and behavior of the Respondent at the roadside and in the back of Officer Cook's patrol vehicle. (R, p. 259, line 3). The jury also had the opportunity to view the breath testing site video and directly observe the demeanor and behavior of the Respondent. (R, p. 260, line 10)

Furthermore, Respondent testified that she had been drinking two Solo cup sized drinks of vodka and Sprite Zero before driving. (R, p. 22)

Just as in Gordon, even if the remedy of redaction and exclusion of the field sobriety tests was implemented, "there is still sufficient evidence to present this case to a jury for resolution." Id. Even more so than in Gordon, in this case there is overwhelming evidence of Respondent's guilt separate and apart from any of the field sobriety tests that Respondent complains of.

III. THE CIRCUIT COURT ERRED IN FINDING THAT SECTION 56-5-2953(B) OF THE SOUTH CAROLINA CODE OF LAWS DID NOT APPLY WHERE THE ARRESTING OFFICER SUBMITTED AN AFFIDAVIT DOCUMENTING THE CIRCUMSTANCES ENCOUNTERED AT THE TIME THE INCIDENT SITE VIDEO WAS RECORDED

The City of Rock Hill argued extensively both to the trial court and on appeal to the circuit court that it was appropriate for the trial court to consider the exceptions to the video recording requirements provided by S.C. Code of Laws Section 56-5-2953(B). Officer Cook along with the other officers were not aware that due to the lighting conditions that existed at the time of the traffic stop that all three cameras video recordings were similarly affected by the cameras recording while facing the setting sun. Officer Cook prepared a video affidavit as required by S.C. Code of Laws Section 56-5-2953(B). (R, pp. 40-41)

The City argued that the affidavit provided by the Officer Cook supported two of the exceptions to the video recording requirements: (1) exigent circumstances existed based on the evening lighting which affected all of the officers' cameras and (2) any other valid reason for the

failure to produce the video recording based upon the totality of the circumstances. (R, pp. 27-36)

The City made this argument as an alternative should the trial court have found that the incident site video recording did not comply with S.C. Code of Laws Section 56-5-2953(A). The trial court did not rule directly on the City's argument as it held that the video recordings produced complied with section 56-5-2953(A) and therefore a ruling regarding whether section 56-5-2953(B) applied was not necessary.

Respondent argues and the circuit court held that this matter was not preserved for appeal. This was error on part of the circuit court as the City was initially the respondent in this matter and it was appropriate for the circuit court to consider any additional reasons appearing in the record to affirm the municipal court's decision. The circuit court, at a minimum, should have remanded the matter back to the municipal court for a ruling rather than engage in fact finding on appeal.

A. THE CIRCUIT COURT ERRED IN HOLDING THAT THE CITY OF ROCK HILL AS RESPONDENT ON APPEAL BEFORE THE CIRCUIT COURT COULD NOT ARGUE ON APPEAL ADDITIONAL REASONS FOR AFFIRMING THE TRIAL COURT EVEN IF THOSE REASONS WERE NOT PRESENTED TO OR RULED ON BY THE TRIAL COURT

The issue of the applicability of Section 56-5-2953 (B) was squarely presented to the municipal court. (R, pp. 27-36) The issue was raised again on appeal to the circuit court where the City was the respondent. (R, pp. 60-81 and pp. 119-123) The issue was raised before the trial court but not ruled on based on the trial courts finding that the incident site video complied with section 56-5-2953(A). On appeal the circuit court refused to consider the argument finding that it was not preserved. This was error on the part of the circuit court.

“A respondent may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, even if those reasons have not been presented to or ruled on by the lower court. The appellate court may review respondent’s additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court’s judgement. The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” S.C. DOL v. Chastain, 392 S.C. 259, 263, 708 S.E.2d 818, 821 (Ct. App. 2011).

The affidavit submitted by Officer Cook provided valid reasons for the exigent circumstances encountered by Officer Cook and the other officers due to the evening lighting conditions and provided a valid reason, based on the totality of the circumstances, for any defects in the quality of video recording. The issue was squarely before the circuit court based on the record on appeal before it and the circuit court erred when it held that the issue was not properly preserved for review.

CONCLUSION

For all the foregoing reasons, the Appellant respectfully submits that the decision of the circuit court reversing Respondent’s conviction and dismissing the charge should be reversed and the conviction reinstated.

Respectfully submitted,



Christopher E. A. Barton
Senior City Solicitor
201 E. Main St., 3rd Floor
Rock Hill, South Carolina 29730
(803) 329-5692
ATTORNEY FOR APPELLANT

May 18, 2016