ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
G. Edward Welmaker, Circuit Court Judge

Case No. 2009-GS-23-02593

The State of South Carolina, ... Respondent,

v

Gregg Gerald Henkel, ... Appellant.

FINAL BRIEF

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(803) 229-5010

Attorney for Appellant

RECEIVED
NOV 13 2012
SC Court of Appeals

Index

Page:

Table of Authorities ii

Statement of Issue on Appeal 1

State of the case 2

Argument:

Question I Did the trial court err in failing to dismiss the indictment against Gregg Henkel on the ground that the officer failed to comply with the mandatory requirements of S.C. Code § 56-5-2953 that both *Miranda* warnings and the field sobriety test be recorded at the scene when Gregg Henkel was arrested? 5

Conclusion 9

Table of Authorities

Cases: Page:

City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) 5, 7

Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011) 5, 7, 8

Statutes:

S. C. Code § 56-5-2953 . . . . 5, 6, 8

Other sources:

Checklist for Horizontal Gaze Nystagmus Test, http://www.ohiopd.com/nhtsaChecklist.pdf (Visited November 19, 2011) 7

Statement of Issues Presented

Did the trial court err in failing to dismiss the indictment against Gregg Henkel on the ground that the officer failed to comply with the mandatory requirements of S.C. Code § 56-5-2953 that both *Miranda* warnings and the field sobriety test be recorded at the scene when Gregg Henkel was arrested?

Statement of the Case

Facts of Case

About 1 a.m. on the morning of January 19, 2008, Ms. Lillie Chastain called 911 to report that a truck was driving erratically on Interstate 385 near Roper Mountain Road in Greenville County. Rec. on App. at 39, ll 23-25 to 40, ll 1-21. After she called 911, she followed the truck until it ran off the road and wrecked near the intersection of Highway 276 near Simpsonville. Rec. on App. at 41, ll 8-19. She observed the truck flip over and a person in a white shirt get out of the truck and jump over a fence near the scene. Rec. on App. at 42, ll 6-22. She was not able to identify the defendant as the person she observed getting out of the truck. At the request of the 911 operator, she returned to the scene and met the investigating officer. Rec. on App. at 53, ll 19-25 to 54, ll 1-5.

Several law enforcement officers searched the area where the truck left the road but did not find the driver. Rec. on App. at 62, ll 12-22. Officer Wesley Hiott, the arresting officer, went to the residence listed for the owner of the truck. He found no one at home. Rec. on App. at 63, ll 10-19. After he was not able to locate the driver of the truck, Mr. Hoitt cleared the scene and resumed his normal patrol. Rec. on App. at 64, ll 12-16.

Later, after 4 a.m., Officer Hoitt received a call that the possible driver of the truck had been located on Interstate 385. Rec. on App. at 64, ll 22-25 to 65, ll 1-5. When he arrived at the scene he found Gregg Henkel, the defendant, in an ambulance being examined by EMS. Rec. on App. at 65, ll 7-10. He was informed that Mr. Henkel did not wish to go to the hospital. After he was told that Mr. Henkel did not wish to go to the hospital, Officer Hoitt activated his video camera and microphone by the remote control on his belt. Rec. on App. at

87, ll 4-13. He then, according to his testimony, in the back of the ambulance gave Mr. Henkel his Miranda warning and administered a horizontal gaze nystagmus test.[1] The Miranda warning was not on the video. See Court's Exhibit 1.

Immediately after the ABC test, Mr. Henkel was arrested and placed in the patrol car. While in the patrol car, he was again given his Miranda warnings. He was also told he would be required the take a breath test and the consequences of refusing such a test.

After a trial by a jury, Mr. Henkel was convicted of driving under the influence and sentenced to three years suspended upon the service of 3 months and 30 months probation.

Procedural Facts

Prior to the start of the trial, defense counsel moved to dismiss the charge on the ground that no field sobriety test was video taped as required by S. C. Code § 56-2953.[2] The trial court reserved ruling on the motion until all the testimony relevant to this issue was presented. Rec. on App. at 37, ll 9-19. At the conclusion of the relevant testimony, defense counsel renewed his motion to dismiss on the failure of the state to comply with the statute. No affidavit was presented by the state explaining why a proper video was not produced. This was due, at least in part, because a video tape was in fact produced. At this point defense counsel also included as a basis for dismissal the failure of the video to include the reading of the

[1] State's exhibit 2 is the redacted version of the roadside video. It begins at 4:19:24 and does not contain the audio of the horizontal gaze nystagmus test. Court's exhibit 1, which is the video provided to defense counsel in discovery, has the video starting right before the HGN test was administered. Neither test is shown on the video as required by the statute. Nor are the *Miranda* warnings given on either tape as required by the statute.

[2] As this case arose before February 10, 2009, the older version of S.C. Code § 56-5-2953 applies. The major difference that affects this case is the requirement under the old law that the *Miranda* warning be on the video tape.

Miranda rights as required by the statute. Rec. on App. at 16-21.

The trial judge denied the motion to dismiss based upon the fact that "the horizontal gaze nystagmus test and reciting the ABC's, are tests that don't cry out for video representation. They cry out for audio representation." Rec. on App. at 155, ll 2-5. He further based his ruling upon the "totality," but failed to state what other factors he considered. Rec. on App. at 155, ll 168, l 20.

The defendant timely filed the notice of appeal on February 7, 2011.

Argument

Did the trial court err in failing to dismiss the indictment against Gregg Henkel on the ground that the officer failed to comply with the mandatory requirements of S.C. Code § 56-5-2953 that both *Miranda* warnings and the field sobriety test be recorded at the scene when Gregg Henkel was arrested?

In *City of Rock Hill v. Suchenski,* 374 S.C. 12, 646 S.E.2d 879 (2007) and *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011) the South Carolina Supreme Court concluded that the dismissal of the charges is a proper remedy when the state fails to comply with the provisions of S. C. Code § 56-5-2953, the statute involving the mandatory video taping of the incident site. The statute requires that the video taping begin with activation of the blue lights. Here the officer had his blue lights activated but did not begin the video recording until he elected to activate the video tape from his belt when he first started talking to Mr. Henkel. The video equipment was operable. The State failed to produce a video tape that complied with the statute.

The exceptions in Subsection B of the statute do not excuse the state in this case from producing a video of the field sobriety tests given by the officer. First, Subsection B does not apply until the state has produced an affidavit, prior to trial, as to why the required conduct was not video taped. As the statute says that the failure to produce the video is not a ground for dismissal only when the arresting officer "submits a sworn affidavit certifying that it was physically impossible to produce the videotape because the person needed emergency treatment, or exigent circumstances existed." S.C. Code § 56-5-2953 (B). Had the state produced an affidavit, then the state could have argued that exigent circumstances existed. The defendant

would then have known what exigent circumstances existed so he would have been prepared to counter the argument.

Subsection B also has another exception that does not apply. When the video taping is not activated by the blue light, such as an investigation of a traffic accident, the video taping must begin "as soon as practicable." Once begun, however the video must "conform with the provisions of this section." *Id.*

First one can argue that the video tape did not begin "as soon as practicable" as required by the statute.[3] The video taping did not begin until the officer elected for it to begin, after he gave the *Miranda* warnings. The officer decided not to activate the video during the initial *Miranda* warnings. The officer elected to begin the video when he started performing the HGN test. If the officer could start the video tape at the time of the HGN test, then obviously it was practicable to start it a few seconds earlier when the *Miranda* rights were given. And the officer elected not to perform the HGN test on the video as required by the statute. At the time the officer performed the HGN test he knew that Mr. Henkel was not going to the hospital and that he would be released to the officer's custody. The officer then elected not to have Mr. Henkel in front of his patrol car when he administered the ABC test. Thus, the officer elected to have a video that did not conform with the mandatory provisions of the statute.

Compliance with the statute would not have been unduly burdensome to the state. Once the officer knew Mr. Henkel was not going to the hospital, he was required by the statute to simply move Mr. Henkel in front of his patrol car to read Mr. Henkel his *Miranda* rights, to

---

[3] Even if the video began as soon as practicable as required by the statute, the video still does not show the field sobriety tests as required by the statute.

perform the HGN and to perform the ABC test. The trial judge decided that because the HGN and ABC's tests are verbal tests then a video was not required. First, the statute does not so provide. All field sobriety tests must be video taped. Secondly, unless the HGN test is administered correctly, its reliability is questionable. Had the test been on the video, then defense counsel would have been in a position to argue as to whether all the necessary steps were in fact performed. He could have made a reasonable determination as to whether the stimulus was the proper distance from the eyes and whether the officer tracked the stimulus to the 45° angle as required. In fact Court's exhibit 1 raises a serious question as to whether the HGN was properly performed. From listening to the video, the HGN test only took 21 seconds. The checklist for the National Highway Traffic Safety Administration states that the minimum time required to perform the HGN test is 56 seconds. *See, Checklist for Horizontal Gaze Nystagmus Test,* http://www.ohiopd.com/nhtsaChecklist.pdf (Visited November 19, 2011). In addition, if the ABC test had been administered on the video, the jury would have had the opportunity to observe Mr. Henkel standing in front of the camera to determine if he were unsteady on his feet or otherwise appeared to be intoxicated. As a result of the failure of the officer to comply with the statute, the jury only saw Mr. Henkel when he was seated in the officer's patrol car.

Suchenski said "[T]he statute in this case provides for dismissal of the charges when the statute is inexcusably violated." *Id.* at 16, 646 S.E.2d at 881. In this case no affidavit as to the failure to produce a video was submitted for the simple reason a video was in fact produced. The officer in this case simply elected not to comply with the statute. The only remedy is a dismissal of the charges. This holding was recently re-affirmed in the *Town of Mt. Pleasant* decision. There the Court held "By requiring a law enforcement agency to videotape a DUI arrest,

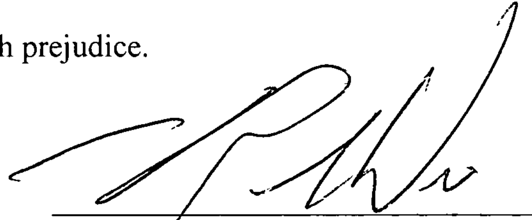
the Legislature clearly intended strict compliance with the provisions of section 56–5–2953 and, in turn, promulgated a severe sanction for noncompliance." *Id.* at 349, 713 S.E.2d at 286.

In a driving under the influence case the state has many advantages. If a defendant blows over .08, the jury is instructed that they may infer the defendant was under the influence. If a defendant blows over .08 the state may elect to charge the defendant with driving with unlawful alcohol concentration and not be required to prove the defendant is materially and appreciably impaired thus making their burden much easier. They only have to prove that the defendant did in fact blow .08 or greater. Even proving bad driving is not required. If a defendant refuses to submit to the test, the state may comment on that fact to the jury.

To help level the playing field and to help improve the quality of the conviction, the legislature simply required that the activities of the defendant at the time of the arrest be video taped. The legislature found this burden was not unduly burdensome. They even gave the local governments time to equip their police cars with cameras. *See*, *Town of Mt. Pleasant, supra.* The legislature gave broad discretion to the courts in the event the video taping equipment failed to function. They recognized that under some circumstances it may not be practicable to immediately start the video tape. But they found that once the officer is able to video tape the defendant, the "videotaping must begin and conform with the provisions of this section." S.C. Code § 56-5-2953(B). Here the officer recognized his obligation to begin video taping but did not recognize his obligation to video tape in compliance with the statute.

CONCLUSION

For the foregoing reasons the conviction of Gregg Henkel should be reversed and remanded with instruction to dismiss the indictment with prejudice.



November 5, 2012

C. RAUCH WISE
305 Main Street
Greenwood, SC 29649
(864) 229-5010
rauch@simplepe.net
S. C. Bar № 06188

Richard Warder

Greenville, SC

Attorneys for Greg Henkel

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
G. Edward Welmaker, Circuit Court Judge

Case No. 2009-GS-23-02593

The State of South Carolina, ... **Respondent,**

v

Gregg Gerald Henkel, ... **Appellant.**

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on November 9, 2012, she did deposit in the United States Mail with proper postage affixed thereto, three copies of the Final Brief and Final Reply Brief in the above case addressed to William Blitch, Office of the Attorney General, Dennis Building, Box 11549, Columbia, SC 29211.

Sandy Traynham

SWORN to and Subscribed

before me this 9 day

of November, 2012.

Mary Jane Harter (L.S.)
Notary Public for South Carolina
My Commission expires: 1/24/13

RECEIVED
NOV 13 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
G. Edward Welmaker, Circuit Court Judge

Case No. 2009-GS-23-02593

The State of South Carolina, ... Respondent,

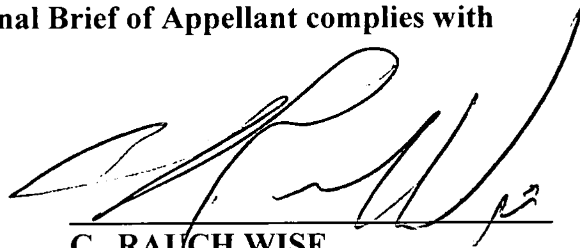
v

Gregg Gerald Henkel, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

Nov 7, 2012



C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorney for Appellant

RECEIVED
NOV 13 2012
SC Court of Appeals