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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 REPLY BRIEF

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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 Greg Henkel was arrested?

The state has not disputed that an affidavit was not submitted in this case. Nor has the state argued that the requirement to submit an affidavit does not apply to this case. Thus, under the statue applicable to this case, the failure to properly conduct the required video taping alone is not ground for dismissal only "if the arresting officer submits a sworn affidavit certifying . . . "that it was physically impossible to produce the video tape because the person needed emergency medical treatment or exigent circumstances existed." S. C. Code § 56-5-2953 (B) The statute then provides that even under the circumstances of an accident investigation, "as soon as videotaping is practicable . . . videotaping *must* begin and conform with the provisions of this section." *Id.* (Emphasis added) Thus, the only question as to whether the videotaping complied with the statute is whether the officer began the taping as soon as practicable.

The state noted that the *Miranda* warnings were given in the patrol car after the defendant had been given the HGN test in the ambulance. But this does not comply with the statute. The plain wording of the statute is that the *Miranda* warnings must be given before the field sobriety tests. The statute provides "The videotaping at the incident site *must*: . . . (b) include the person being advised of his Miranda rights *before* any field sobriety tests are administered . . . ." S. C. Code § 56-5-2953(1) (b) (emphasis added). The officer is not required

to give an HGN or other field sobriety test. The statute, however, mandates that the officer give the *Miranda* warnings at the scene and before any field. He has no discretion on that issue.

The officer testified that he gave the *Miranda* warning before the HGN test but he did not record the warning as required. The question, therefore, is did he begin the recording as soon as practicable. The sole basis the state uses to conclude that the video taping began as soon as practicable is that the officer testified to that fact. But the facts prove the officer wrong. He had the ability to turn on the recording equipment anytime after he left his vehicle upon arriving at the scene. An argument could be made that is was not practicable to turn on the recording devise when he went to the ambulance to check on Mr. Henkel as he did not know Mr. Henkel's condition and whether he was going to the hospital. But once the officer determined that Mr. Henkel was not going to the hospital and he suspected him of driving under the influence, it was practicable for him to turn on the recording equipment and the law required him to do so. It was practicable for him to take Mr. Henkel in front of the patrol car to conduct the HGN test on video. As noted in the opening brief, the officer elected to turn on the video recorder after he allegedly administered the *Miranda* warnings. Obviously it was practicable to turn on the video recorder a few seconds earlier. The officer elected not to comply with the statute.

The state further argues that the *Miranda* warnings and the HGN test are tests that "cry out for audio." The simple answer is that the requirement of the statute says otherwise. The statute requires that both be on the video. When the statute requires that the field sobriety test be recorded on the video, this requirement simply cannot be met by an audio recording of the HGN test.

The state is not aided by *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (2011). The most that can be said about the *Murphy* case is that the requirement of video taping the conduct is that all the conduct need not be recorded. The language in *Murphy* supports Mr. Henkel. In the case, this court said "Therefore, in regard to what must be recorded, the plain language of the statute is not violated as long as the recording captures (1) the accused's conduct and (2) Miranda warnings prior to field sobriety tests, if such tests occur. Murphy does not allege the video fails to capture her being advised of Miranda, but only that the statute requires that she remain in full view and record all field sobriety tests." *Id.* at 631, 709 S.E.2d at 688. *Murphy* states that the statute requires that the *Miranda* warnings must be on the video and before any field sobriety test. As the South Carolina Supreme Court said "dismissal of the DUAC charge is an appropriate remedy provided by § 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions." *City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007). In this case, the state has not established that the exceptions in subsection B apply.

CONCLUSION

For the forgoing reasons and for the reasons set forth in the opening brief, this matter should be reversed with directions to dismiss the case.

November 5, 2012

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CERTIFICATE OF COUNSEL

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

November 7th, 2012

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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