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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER LEE JOHNSON,

APPELLANT

Appellate Case No. 2011-201808

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying the motion to dismiss Appellant's DUI charge after Greenville Police Department failed to comply with all of the mandatory videotaping provisions of S.C. Code § 56-5-2953 (2010) and failed to provide a valid reason for its willful violation of the video-recording requirements?

STATEMENT OF THE CASE

On April 12, 2011, Appellant Christopher Johnson was indicted by the Greenville County Grand Jury for driving under the influence (DUI) and driving under suspension (DUS). R. 218 – 223.

On October 10, 2011, Appellant proceeded to trial before the Honorable G. Edward Welmaker and a jury. R. 1. Appellant was represented by Daniel Farnsworth, and the State was represented by Sara Drawdy. R. 1.

On October 11, 2011, the jury found Appellant guilty as charged. R. 158, ll. 12-23. The trial court sentence Appellant to one year imprisonment suspended upon the service of nine months on the DUI conviction and thirty days imprisonment on the DUS conviction. R. 166, ll. 1-18. The trial court gave Appellant credit for serving two hundred and seventy-three days in pretrial detention and ordered Appellant to serve fifteen months probation. R. 160, ll. 17-19; 166, ll. 1-6. The sentences were to run concurrently. R. 166, ll. 17-18.

This appeal follows.

STATEMENT OF FACTS

Relevant Facts

Pre-trial, defense counsel moved to dismiss the DUI charge because the arresting officer's vehicle was not equipped with a video camera pursuant to section 56-5-2953 of the South Carolina Code.¹ R. 10, ll. 19 – 13, l. 6. Defense counsel argued "that the facts in this case are very similar to the facts in [*Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011)]." R. 13, ll. 14-15. Defense counsel noted, "And we have no argument with respect to th[e] . . . breath site test." R. 14, ll. 8-11.

At the pre-trial hearing, Jesse Lowe of the Greenville County Police Department (GPD) stated that on March 18, 2010, he was the arresting officer in this case and he was driving a "*marked patrol vehicle*." R. 16, ll. 16-25 (emphasis added). Officer Lowe admitted that he signed an affidavit for failing to produce a videotape because "[his] *patrol car was not equipped with a video camera at the time of the incident*." R. 17, ll. 10-23 (emphasis added); Court's Exhibit # 1. Officer Lowe then maintained,

I observed [Appellant] back out of a parking space . . . within the city limits of Greenville, South Carolina with no lights on, headlights or tail-lights. I then . . . observed that one of his tail-lights was inoperable. And I also observed him stop at a red-light and then proceed through the intersection before the light had [turned] green and then again stop in the middle of the intersection.

R. 18, ll. 5-13.

¹ S.C. Code Ann. § 56-5-2953 (2010) (providing in relevant part: "(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 videotaped. (1) The videotaping at the incident site must: (a) begin not later than the activation of the officer's blue lights and conclude after the arrest of the person for a violation of Section 56-5-2930, 56-5-2933, or a probable cause determination that the person violated Section 56-5-2945; and (b) include the person being advised of his Miranda rights before any field sobriety tests are administered, if the tests are administered."

Officer Lowe recalled that this observation prompted him to activate his blue lights and that Officer Donnie Ng arrived approximately two minutes later to assist in the traffic stop. R. 19, ll. 14-25. Officer Lowe revealed that, although Officer Ng *also* did not have an in-car video camera, Appellant's field sobriety tests were recorded by "a small [personally owned video] camera [Officer Ng] had on his person." R. 19, ll. 3-24.

On cross-examination, Officer Lowe noted that the marked patrol car "was a 2002 or 2003 model, Crown Vic." and that he was assigned to drive that patrol car about two months prior to this traffic stop. R. 23, ll. 11-16. Officer Lowe also admitted that as an officer for GPD he conducts traffic stops and issues tickets for traffic violations. R. 24, ll. 7-11.

The State then called Officer Joe Browning of GPD who works on "the financial side of the Police Department as a lieutenant." R. 25, ll. 1-10. Officer Browning stated that he was asked to review records regarding GPD's request for and ownership of video cameras. R. 25, ll. 15-20. Officer Browning then provided an outline of GPD's requests for video cameras and the dates for when cameras were provided by the State or bought by GPD. R. 25 – 72. Officer Browning further noted: (1) GPD purchased eighty-nine digital video cameras on February 23, 2010; (2) "[a]ll but twenty-one" of those cameras have been installed; (3) GPD had approximately one-hundred and seventy marked patrol cars; and (4) "*about eight to ten cars*" are for traffic enforcement. R. 56, l. 2 – 59, l. 23 (emphasis added).

Furthermore, Officer Browning admitted that GPD only wanted to equip new patrol cars with video cameras and that GPD refused the VHS video cameras that were immediately available from DPS in 2009 by requesting digital video cameras. R. 39, l. 13 – 40, l. 6; R. 65, l. 1 – 66, l. 4. In addition to Officer Browning's claim that VHS video cameras were problematic, he also claimed, "[a]t that point the city had already expended

quite a bit of funds heading toward a digital system.” R. 66, ll. 9-12.

On cross-examination, Officer Browning admitted that GPD had double and even triple the number of DUI cases in 2010 than it had in previous years. R. 76, ll. 6-16. Officer Browning also admitted that out of the GPD’s one-hundred and seventy marked cars, only about twenty-one had video cameras installed when Appellant was arrested. R. 78, ll. 4-18.

Elaine Johnson, Director of the Department of Resource Management for the Department of Public Safety (DPS), admitted that GPD is considered high producing based on the total number of arrests in 2002. R. 94, ll. 9-11. Johnson also revealed that DPS distributed the cameras based on the police departments with the greatest number of video camera requests. R. 97, l. – 101, l. 25; R. 104, ll. 12-17. Notably, Johnson indicated that other highly populated cities requested significantly more video cameras than GPD: Charleston Police Department requested two hundred cameras; and Columbia Police Department requested one hundred and ninety-three cameras compared to GPD’s request for twenty cameras. R. 101, ll. 16-25. Johnson further noted that GPD “received [the following number of video cameras from DPS:] one in 2002, five in 2003 and a total of fifteen in two different months[,] Ten in February and five in March.” R. 95, ll. 18-23.

The trial court ultimately denied Appellant’s motion to dismiss:

[M]y primary reliance is on footnote 15 of the [*Town of Mt. Pleasant v. Roberts*] opinion in light of Court exhibits 7, 11 and 15 in this case. And that’s solely the basis upon which I’m making this decision. Well, plus the interpretation of that statute and the totality of the circumstances and considering section (b) and section (g). . . . And I think that makes this case quite different from [*Town of Mt. Pleasant v. Roberts*] whereas Greenville was always seeking to get to the trough to get the equipment when they could, expending their own dollars in addition. So I respectfully deny your motion.

R. 114, l. 9 – Supp. R. 1, l. 8.

ARGUMENT

The trial court erred in denying the motion to dismiss Appellant's DUI charge after Greenville Police Department failed to comply with all of the mandatory videotaping provisions of S.C. Code § 56-5-2953 (2010) and failed to provide a valid reason for its willful violation of the video-recording requirements.

In *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011), the South Carolina Supreme Court found, "Our appellate courts have strictly construed section 56-5-2953 [of the South Carolina Code] and found that a law enforcement agency's failure to comply with these provisions is fatal to the prosecution of a DUI case."² See S.C. Code § 56-5-2953 (2010). Subsection (A) of section 56-5-2953 provides in relevant part: A person who operates a vehicle while under the influence of alcohol "*must have his conduct at the incident site . . . video recorded [and] . . . [t]he video at the incident site must begin not later than the activation of the officer's blue lights[.]*" (emphasis added).

However, subsection (B) of section 56-5-2953 outlines four exceptions that excuse noncompliance with subsection (A)'s mandatory video recording requirements. Specifically, a police department's failure to comply with the video recording requirement is excused when: (1) the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) the arresting officer submits a sworn affidavit that it was impossible to produce the video recording because either (a) the defendant needed emergency medical treatment or (b) exigent

² (citing *City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (holding that "dismissal of the DUAC charge is an appropriate remedy provided by section 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions") and *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011) (recognizing the State's noncompliance with section 56-5-2953, which is not mitigated by a statutory exception, warranted dismissal; holding that video complied with section 56-5-2953(A) even though it did not capture a continuous full view of the accused at the incident site (citing *Suchenski*)).

circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's arrests; or (4) for any other valid reason for the failure to produce the video recording based upon the totality of the circumstances. *See* § 56-5-2953(B).

Furthermore, subsection (G) of section 56-5-2953 provides in relevant part: “The provisions contained in Section 56-5-2953 (A), (B), and (C) take effect for each law enforcement vehicle used for traffic enforcement once the law enforcement vehicle is equipped with a video recording device.” Our Supreme Court has held that police departments cannot “continually evade its duty [under subsection (A) of section 56-5-2953] by relying on subsection (G) of section 56-5-2953.” *Roberts*, 393 S.C. at 347, 713 S.E.2d at 285. Thus, a police department’s “failure to equip its patrol vehicles does not negate the application of the statutory exceptions in subsection (B).” *Id.*; *See* § 56-5-2953(B).

In this case, defense counsel moved to dismiss Appellant’s DUI charge prior to trial because the arresting officer’s vehicle was not equipped with a video camera pursuant to section 56-5-2953 of the South Carolina Code. R. 10, l. 19 – 13, l. 6. Defense counsel argued “that the facts in this case are very similar to the facts in [*Roberts*, 393 S.C. 332, 713 S.E.2d 278].” R. 13, ll. 14-15. Jesse Lowe of the GPD admitted at the pre-trial hearing: (1) he was the arresting officer in this case; (2) he was driving a “*marked patrol vehicle*,” (3) as a police officer for GPD he conducts traffic stops and issues tickets for traffic violations; and (4) he was required to draft an affidavit for failing to produce a videotape because “[his] *patrol car was not equipped with a video camera at the time of the incident.*” R. 16, l. 16 – 24, l. 11 (emphasis added); Court’s Exhibit # 1. Officer Lowe further recalled that Officer

Donnie Ng arrived approximately two minutes later to assist in the traffic stop and that officer Ng recorded Appellant's field sobriety tests with "a small [personally owned video] camera [Officer Ng] had on his person." R. 19, ll. 3-25.

Additionally, Officer Joe Browning of GPD who works on "the financial side of the Police Department as a lieutenant" admitted that GPD only wanted to equip new patrol cars with video cameras and that GPD refused the VHS video cameras that were immediately available by requesting digital video cameras from DPS in 2009. R. 39, l. 13 – 40, l. 6; R. 65, l. 1 – 66, l. 4. Officer Browning also admitted that GPD had double and even triple the number of DUI cases in 2010 than it had in previous years. R. 76, ll. 6-16. Officer Browning further admitted that out of the GPD's one-hundred and seventy marked cars, only about twenty-one had video cameras installed when Appellant was arrested. R. 78, ll. 4-18.

Elaine Johnson, Director of the Department of Resource Management for the DPS, admitted that GPD is considered high producing based on the total number of arrests in 2002. R. 94, ll. 9-11. Johnson also revealed that DPS distributed the cameras based on the police departments with the greatest number of video camera requests. R. 97, l. – 101, l. 25; R. 104, ll. 12-17. Notably, Johnson indicated that other highly populated cities requested significantly more video cameras than GPD: Charleston Police Department requested two hundred cameras; and Columbia Police Department requested one hundred and ninety-three cameras compared to GPD's request for twenty cameras. R. 101, ll. 16-25.

Notably, the instant case mirrors the facts presented in *Town of Mt. Pleasant v. Roberts* because "the initial three exceptions did not apply and could not justify [GPD's] failure to videotape [all of Appellant's] DUI arrest" and "the only feasible exception is

that there was a ‘valid reason’ for the [GPD]’s failure to comply with the mandatory videotaping requirements [based upon the totality of the circumstances].” *Id.* at 347, 713 S.E.2d at 285-86. “Taking into consideration the purpose of section 56-5-2953, which is to create direct evidence of a DUI arrest,” GPD’s failure to request immediately available VHS camera equipment from DPS and equip its older patrol cars with video cameras “, defeats the intent of the Legislature and violates the statutorily-created obligation to videotape DUI arrests.” *Roberts*, 393 S.C. at 347, 713 S.E.2d at 285.

Same as in *Town of Mt. Pleasant v. Roberts*, the affidavit signed by the arresting officer was a form generated by GPD, which included a “check box” that stated: “At the time of the Defendant’s arrest the vehicle I was operating had not yet been equipped with videotaping device and therefore pursuant to Section 18 of Senate Bill 174 of 1998, the videotaping requirement regarding vehicles is not applicable.” R. 167; Court’s Exhibit # 1. Although the backup Officer videotaped the field sobriety tests with a personal camera, not all of the videotape-recording requirements were met because a person who operates a vehicle while under the influence of alcohol “*must have his conduct at the incident site . . . video recorded [and] . . . [t]he video at the incident site must begin not later than the activation of the officer’s blue lights[.]*” § 56-5-2953(A) (emphasis added).

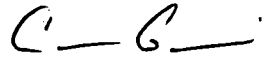
“By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance.” GPD’s failure to request immediately available VHS camera equipment from DPS and equip its older patrol cars with video cameras was not a valid reason for not complying with the video-recording requirements. *See* § 56-5-2953; *see also Roberts*, 393 S.C. 332, 713 S.E.2d 278.

Accordingly, GPD failed to satisfy any of the statutory exceptions listed in subsection (B) of section 56-5-2953, and GPD's unexcused failure to video record *all* of Appellant's conduct initiating the traffic stop warranted dismissal of Appellant's DUI charge. *See Id.* (finding the Legislature imposes a statutory obligation on the State to create evidence and provides dismissal as a sanction for inexcusable noncompliance).

CONCLUSION

Based on the foregoing reasons, Appellant Christopher Johnson respectfully requests that this Court reverse his conviction and sentence for driving under the influence and dismiss this case pursuant to *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011).

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of May, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR.

May 24th, 2013

A handwritten signature in black ink, appearing to read 'C. Ganjehsani', is written over a horizontal line.

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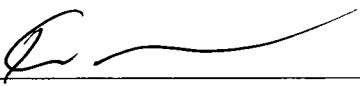
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of May, 2013.



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 24th day of May, 2013.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.