STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARTY BAGGETT,

APPELLANT

Appellate Case No. 2011-204146

FINAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to direct a verdict of acquittal in Appellant's favor on the charge of felony driving under the influence where the prosecution failed to present evidence of video of his conduct at the incident site?

STATEMENT OF THE CASE

A Williamsburg County grand jury indicted Appellant for reckless homicide (2010-GS-45-0269) and felony driving under the influence (DUI) (2010-GS-45-0270) during its October 2010 term. R.361 (Indictments). The case proceeded to trial on July 18, 2011, before the Honorable George C James, and a jury. R. 1. David Stumbo and Dale Scott of the Attorney Gen.'s office prosecuted the case. Sam Floyd represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 337, lines 11 – 17. Judge James sentenced Appellant to 10 years imprisonment on the reckless homicide conviction. R. 341, lines 8 – 12. Judge James sentenced Appellant to 20 years imprisonment and a fine of $25,000 on the felony DUI conviction. He ordered the sentences to be served concurrently. R. 342, lines 5 through 9. Appellant filed a motion for new trial on July 29, 2011. R. 343 (Motion). By order filed December 2, 2011, Judge James denied Appellant's motion. R.359 (Order).

Appellant filed a timely notice of new trial. This brief follows.

STATEMENT OF FACTS

Thomas "Rod" Garris was romantically involved with Jean Turner for thirteen years. R. 3, line 19 – R. 4, line 2. On March 8, 2007, Garris and Turner began drinking beer around three o'clock in the afternoon. R. 5, lines 5 – 11; R. 5, line 21 – R. 6, line 8. Turner suffered from alcoholism and had received treatment for alcohol abuse in the past. R. 7, lines 1 – 5. Garris and Turner met Appellant at a convenience store where all three agreed to return to Appellant's house. On the way to Appellant's house, they stopped at a liquor store. R. 10, line 2 – R. 11, line 20; R. 39, lines 16-18; R. 40, lines 21-22; R. 41, lines 11-23; R. 43, lines 20-25. Garris claimed Appellant purchased a fifth of Smirnoff vodka at the liquor store, R. 13, lines 8 – 13, but the owner of the store testified Appellant purchased one pint of Lord Calvert, R. 48, lines 11-25.

According to Garris, Appellant drove out of his way to take them to Turner's house, and while in the car informed them they would not get out of the truck until they drank the rest of the liquor. R. 15, lines 3 – 17. Thereafter, they "finished the liquor." R. 15, line 20. The trio continued driving "all over Williamsburg County." R. 17, lines 3 – 5.

Garris claimed that while he was urinating in a field, Appellant drove his truck approximately one hundred yards from Garris and then backed up real quick, causing Garris to jump into a ditch to get out of his way. Despite this alleged act of aggression, Garris returned to the cab of the truck. R. 17, lines 8-24. Garris further admitted that his statement to police did not include anything about Appellant allegedly trying to back over him. R. 29, line 21 – R. 30, lines 2.

When Appellant stopped the truck on the shoulder of the road about twenty feet from Turner's driveway, Garris exited the truck. Garris claimed he had Turner by the hand and was assisting her getting out of the truck. According to Garris, Appellant grabbed Turner by the arm to prevent her from leaving the truck. Garris threw his beer in the ditch and tried to jerk Turner out of the truck. Appellant then ran over Garris's arm and left. R. 18, line 14 – R. 19, line 8. Although the Garris claimed Appellant ran over his arm with his truck, Garris's arm was not broken. R. 32, line 19.[1] Garris walked to Turner's mother's house. Turner's mother took Garris home. Garris did not call law enforcement. Garris admitted that he was high at the time, but denied that he was drunk. R. 20, line 11 – R. 21, line 23.

When questioned by police the following day, Garris stated that he believed Turner probably jumped out the truck. R. 26, lines 1 – 18. When law enforcement asked if Appellant had been drunk, Garris told law enforcement, "they had been drinking." R. 30, lines 17 – R. 31, line 9. Garris specifically told law enforcement they were not drunk. R. 32, lines 3 – 11. Garris testified that Turner drank one beer and three or four drinks of liquor that day. R. 35, lines 14 – 21.

Hanna confirmed that Appellant was not drunk when he entered the liquor store. R. 49, lines 15 – 24; R. 50, lines 16 – 17.

On the afternoon of March 8, 2007, Carolina Jones turned onto Clare Road. She saw the road was blocked by Appellant in a white pickup. When she asked to get by, Appellant refused and stated he had found a dead body. Jones observed Appellant

[1] The police officer who interviewed Garris testified that he did not observe any injuries to Garris and that Garris did not tell the police that Appellant allegedly tried to run over him. R. 154, lines 8 – 25; R. 155, lines 1 – 6.

standing over the body. R. 106, line 9 – R. 107, line 7; R. 115, liens 2-6. Jones testified that Appellant seemed kind of drunk because he was staggering and repeating himself, but she did not detect alcohol on his breath. R. 107, lines 15 – 16; R. 107, lines 22 – 25. Jones left the area, returned home, and called 911. R. 113, lines 23 – 25.

Ralph Baggett received a phone call on March 8, 2007 from his son, Appellant. R. 120, lines 18 – R. 121, line 10. Ralph testified Appellant was not drunk. R. 125, lines 17 – 25. Ralph testified that he did not remember telling the police that Appellant said he thought he had run over some person. R. 126, lines 19 – 20.

Vincent Staggers, employed by the Williamsburg County Sheriff's Department, responded to the scene. R. 128, lines 15 – 21; R. 129, lines 6 – 8. Staggers claimed Appellant was unstable on his feet and had an odor of alcoholic beverage on his person. R. 130, lines 10 – 15. Despite his belief that Appellant was intoxicated, Staggers did not perform a field sobriety test on Appellant. R. 137, lines 12-16. He conducted no scientific testing to determine if Appellant had been drinking. R. 137, line 21 – R. 138, line 1. According to Staggers, Appellant stated Turner was driving the vehicle when she suddenly fell out of the truck. Appellant then tried to help her. R. 132, lines 9-21.

Steve Boston, another employee of the Williamsburg County Sheriff's Department, responded to the scene. Boston advised Appellant of his rights. R. 141, lines 9 – 22. Boston claimed that Appellant stated that he picked up an unknown woman, who was homeless, at the liquor store. R. 142, lines 10 – 17. According to Boston, Appellant stated that he was too drunk to drive so he let the woman drive. As they were traveling down Clare Road, "she just fell out of the truck." R. 143, lines 8 – 16. Boston testified that he could smell alcohol on Appellant, whose speech was slurred. Boston described

Appellant as "very intoxicated." R. 144, lines 12 – 19; R. 178, lines 19-22. Thereafter, Appellant was transported to the police department. R. 145, lines 3 – 8.

At the police department, Appellant allegedly told Boston that he had picked up a homeless woman and a white male. Thereafter, Appellant invoked his right to silence. R. 147, lines 5 – 13. Appellant was charged with DUI. R. 147, lines 23 – 24.[2] Boston testified that the arrest was based upon Appellant allegedly admitting to being drunk. R. 148, lines 2 – 5. Boston testified that Appellant was ultimately charged with murder, and Boston was unaware of what happened to the DUI charge, as he was not the investigating officer concerning the charge. R. 148, lines 18 – 24.

Boston claimed that Appellant gave a subsequent statement. Appellant ran into Turner and a white male at the liquor store. Appellant stated that while he was riding he had been drinking all day. Turner and the white male argued while in the vehicle, and Turner asked Appellant to stop so the man could get out. Appellant stopped the vehicle and the man got out. Then, Turner was driving the truck. As they went down Clare Road, Turner fell out of the truck. R. 150, lines 12 – R. 151, line 5; R. 152, 15 – 19. Boston admitted that he found no evidence of anything other than the fact of what Appellant said - Turner fell out of the truck. R. 163, lines 16 – 20; R. 179, line 15 – R. 180, line 1.

Juan Ballard, an officer with the Williamsburg County Sheriff's Office, responded to Clare Road as well. R. 180, line 16 – R. 181, line 14. When Ballard arrived on the

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[2] Boston explained that he did not take Appellant to the hospital in an attempt to draw blood, and that it would have been job of the evidence custodian to do that. R. 169, lines 19-25. He was aware of the statutory requirement that a person must submit to a blood draw if there is probable cause to believe the person engaged in felony DUI. R. 170, lines 6-15; R. 175, lines 8-12.

scene, Appellant was in the back of a patrol car. R. 182, lines 22-23. Appellant was "staggering around a little bit." R. 183, lines 5-9. Ballard testified that it would have been his call "to do DUI testing on the suspect." R. 184, lines 20-22. Ballard arrested Appellant for DUI based upon Appellant appearing highly intoxicated and allegedly admitting to Staggers that he had been driving. R. 184, lines 23-25; R. 188, lines 13-19. Less than a month later, Ballard dropped the ticket. R. 185, line 13 – R. 186, line 1. Ballard dropped the DUI charge because Appellant was charged with murder the following day and he did not have "any blood anything like Breathalyzer blood alcohol" to support the charge. R. 186, lines 20-24; R. 186, line 25 – R. 187, line 2. Regarding testing for DUI, Ballard testified he thought "the BA machine … was down at that time" in Kingstree. R. 191, lines 4-7. He further testified he thought Hemmingway had a BA machine, but he was uncertain. He denied ever going to Hemmingway to determine if the machine was in working order and available. R. 191, lines 8-18. In direct contradiction of his earlier testimony, Ballard testified that the investigator in charge, presumably Boston, made the decision not to administer breathalyzer test or take blood sample. R. 197, line 20 – R. 198, line 3.

William Foxworth, an inmate in the Department of Corrections, testified that he shared a cell with Appellant. R. 204, lines 10-20.[3] Despite Foxworth not being forthcoming about his charges, he claimed Appellant shared intimate details of his. He claimed Appellant stated that he, Garris, and Turner had been riding around drinking and

[3] Foxworth's prior record included accessory, burglary third degree, and assault and battery. R. 207, lines 10-13. Foxworth claimed he received nothing in exchange for his testimony, R. 207, line 20 – R. 208, line 10, but on cross-examination, he admitted that forty-five days after he told the police what he claimed Appellant told him that he went to court on his burglary charge and received probation. R. 208, line 24 – R. 209, line 4.

they dropped Garris off somewhere. Then Appellant and Turner were on a dirt road when the subject of sex came up. Turner then got out of the truck and started walking. Appellant cranked the truck up and backed up over Turner. Foxworth testified that Appellant did not say if it was intentional or accidental. R. 204, lines 21-25; R. 205, lines 4-17. Upon questioning by the prosecutor, Foxworth elaborated that Appellant said he and Turner started fussing at a store and the fussing continued while the subject of sex came up until Turner got out of the truck and started walking. R. 206, lines 13-21. Appellant then cranked up the truck and backed up. Foxworth was "not sure if he was just trying to catch her, but he run her over." R. 206, line 22-24.

Dr. Erin Presnell, a forensic pathologist performed an autopsy on Turner on March 9, 2007. R. 216, lines 15-18. She determined the cause of death was a lot of head trauma. Relying upon the investigation, Dr. Presnell determined Turner's blunt head trauma was most likely caused by a vehicle running over her. However, Dr. Presnell could not determine manner of death – homicide or accident. R. 218, line 3 – R. 219, line 22. Her scientific results were inconclusive in that regard. Dr. Presnell drew Turner's blood at the time of the autopsy as part of her standard procedure. Turner's blood alcohol level was 0.387. R. 224, lines 20-23. Further, examination of Turner's liver revealed it was consistent with someone who suffered from chronic alcohol abuse. R. 226, lines 8-24.

Dr. Presnell explained that if Turner had been standing upright outside the truck, she would expect to see leg injuries, often called "bumper fractures." She found no such injuries on Turner. She admitted that one possible scenario was that Turner was upright

and a slow moving vehicle knocked her over and then ran her over. R. 229, lines 6-23. However, she explained an equally possible scenario was that Turner fell out the car and was run over, just as Appellant said. R. 229, line 24 – R. 230, line 4.

Jeff Scott, an employee with the Williamsburg County Sheriff's Office, responded to the crime scene on Clare Road. R. 52, lines 15 – 18; R. 53, line 24 – R. 54, line 8. Scott processed the truck several days after the accident, and while the truck was at a private garage. R. 76, lines 8 – 21. Scott admitted he was not aware of how the truck was transported to the private garage. R. 77, line 23 – R. 78, line 1.[4] While processing the truck, Scott found a small stain on the undercarriage of the truck. R. 66, lines 2 – 14. Scott swabbed the area. R. 67, lines 11 – 17. Scott did not find any of Turner's hair under the truck. R. 92, lines 1 – 4. Scott's examination of the truck revealed no indentations or impact marks. R. 93, lines 13 – 24. He testified that the bumper and everything were intact. R. 93, line 24.

Jasper Humbert, a former employee of SLED in the forensic DNA department, analyzed blood samples he received in this case. Humbert's testing of six swabs taken from under the passenger door of Appellant's truck revealed the presence of blood. Thereafter, Humbert conducted DNA analysis on the six swabs. Humbert testified that based on his DNA analysis, he concluded Turner's blood was found on one of the swabs taken from under the passenger door. R. 245, lines 4-12; R. 249, lines 12-22; R. 255,

[4] Boston, the investigator on the case, was unaware of how the truck left the crime scene, but he was aware that the truck was recovered the following day from the Baggett's residence. R. 160, line 16 – R. 161, line 5. In other words, the police did not maintain custody and control over the truck prior to processing it for evidence. Although Boston was the investigator over the case, he testified that it would then the decision of the evidence custodian, Scott, to determine whether to impound the truck. R. 161, lines 14 – 24.

lines 5-9; R. 255, line 16 – R. 256, line 8; R. 259, lines 1-10; R. 260, lines 16-19. Humbert also tested a swab taken from the front side bumper under the headlight. This sample was negative for blood. R. 263, lines 9-18.

At the close of the state's case, Appellant moved for a directed verdict regarding the charge of felony DUI. Appellant relied upon Section 56-5-2953 of the South Carolina Code to support his position that Appellant was entitled to a directed verdict because the state failed to produce a video of Appellant's roadside arrest. Additionally, Appellant relied upon case law, primarily Town of Mount Pleasant v. Roberts and City of Rock Hill v Suchenski, to support his motion. R. 273, lines 5-19; R. 275, lines 8-15; R. 274, line 22 – R. 275, line 9; R. 276, line 10 – R. 277, line 5.

The prosecution argued that the video requirement of section 56-5-2953 provided for an exception. He relied upon the portion of the statute providing "nothing in this section prohibits the court from considering any other valid reason for failure to produce a video recording, based on the totality of the circumstances." The prosecutor argued the exception applied based upon the evidence presented. Specifically, the prosecutor argued that because law enforcement "was responding to a dead body on the open road out in the rural part of Williamsburg County" the exception applied. He claimed this case was

> [A] completely different scenario than ... in probably 99 percent of the DUI cases in this state, where an officer pulls over a vehicle for, even pulls over a vehicle for suspected DUI or arrives on an accident scene where there [are] injured people and people inside a car, where there's a smell of alcohol. Here you had an individual who was deceased on the side of the road and at that point, the officers, ..., from their testimony on the stand, I believe that they would say they were looking at this dead body, is this a murder or is this an accident or what is this? And they were trying to wrap their arms, at that point, around what they were investigating.... [A] lot of the procedural requirements that are built into the statute here, particularly video tape requirement, ..., I believe under the totality of the circumstances, was not, was not at play here. I believe

> that's a valid reason why Your Honor could essentially give Williamsburg County Sheriff's Department a pass here for not having a video tape of this crime scene, based on what had happened. ... [A]fter the fact, when they realized that [Appellant] himself said he was drunk and they had other witnesses there to talk to during the course of the next day or so that confirmed that, that they thought at that point, okay, maybe we have a DUI on our hands as well and he was ticketed for DUI.

R. 289, line 23 – R. 291, line 24.

The prosecutor continued this rationale later when he argued the police had "no thought of video camera taping or anything else relating to the DUI requirements" when they arrived on the scene because there was a dead body on the side of the road and "[t]hey were trying to figure out how to investigate a homicide." In the prosecutor's view, the police could not be expected "to be thinking about the procedural rigors of the DUI statute." R. 303, lines 4-14. Essentially, the state conceded the videotaping requirements applied to Appellant's case, but argued their failure was excused.

Appellant countered that the statutory requirements and the case law were clear – the police were required to video the road site. Failure to do so was fatal to the prosecution's case of Appellant. R. 293, lines 9-24.

The judge denied Appellant's motion for a directed verdict on the felony DUI charge. Relying upon City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007), the judge found the appellate courts "indisputably established that the videotaping provisions [were] mandatory and not optional." R. 302, line 8 – R. 303, line 1. He found the totality of the circumstances excused the mandatory videotaping requirement. R. 304, line 25 – R. 305, line 12.

After the judge charged the jury on the law, the jury asked the judge whether chemical testing was necessary in order to prove felony DUI and/or DUI. The judge

responded that he had instructed the jury on the elements of both charges, which was all the prosecution was required to prove. The jury asked to be re-instructed as to both, and the judge complied. R. 331, line 13 – R. 336, line 1.

The jury ultimately found Appellant guilty of reckless homicide and felony driving under the influence. R. 337, lines 11-17. The judge sentenced Appellant to ten years' imprisonment for the reckless homicide conviction. He sentenced Appellant to twenty years' imprisonment on the felony DUI conviction and ordered him to pay a fine of $25,000. He ordered the sentences to run concurrently. R. 341, lines 8-14; R. 342, lines 5-9.

After the trial, Appellant filed a motion for new trial. He challenged the prosecution's failure to present videotaping of the incident site. He cited the South Carolina Supreme Court's case of Town of Mount Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011) as supporting his position. Based upon the failure of the state to produce a video of the incident site, Appellant moved for a new trial resulting in a dismissal of the charge. R. 343 (Motion).

By order dated November 30, 2011, Judge James held the videotaping requirements applied to Appellant's case, but that the failure to videotape the incident site was excused based on the totality of the circumstances exception under section 56-5-2953(B). Judge James concluded that "law enforcement was dispatched to the scene and encountered [Appellant], his truck, the victim's body, and other circumstances that did not immediately point to a DUI scenario." He acknowledged the police testified Appellant was "visibly intoxicated" and "charged at some point with DUI." But, he relied upon Investigator

Boston's testimony that the incident was being investigated as a possible kidnapping and murder to excuse the officer's failings. R. 359 (Order).

ARGUMENT

I. The trial judge erred in failing to direct a verdict of acquittal in Appellant's favor on the charge of felony driving under the influence where the prosecution failed to present evidence of video recording of his conduct at the incident site.

In 2007, at the time of the accident, South Carolina law concerning the office of felony DUI provided as follows:

> A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a vehicle and when driving does any act forbidden by law or neglects any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes great bodily injury or death to a person other than himself is guilty of a felony.

S.C. Code Ann. § 56-5-2945(A)(2007). Thus, felony DUI required proof of three elements: (1) the person drove a vehicle while under the influence of alcohol and/or drugs; (2) the person engaged in an act forbidden by law or neglected a duty imposed by law; and (3) the act or neglect proximately caused great bodily injury or death to another person. State v. Grampus, 288 S.C. 395, 397, 343 S.E.2d 26, 27 (1986) abrogated on other grounds by State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997).

South Carolina statutory law also provided that a person who violated section 56-5-2945 "must have his conduct at the incident site and breath site videotaped." S.C. Code Ann. § 56-5-2953(A)(2007). The statute provided that the videotaping at the incident site:

> must begin not later than the activation of the officer's blue lights and conclude after … a probable cause determination that the person violated Section 56-5-2945; and include the person being advised of his Miranda[5] rights before any field sobriety tests are administered, if the tests are administered.

[5] Miranda v. Arizona, 384 U.S. 426 (1966).

Id. The statute excused failure to produce the videos where the officer submitted sworn affidavits regarding inoperable equipment. The statute also provided that in accident investigations, where an arrest was made and the videotaping equipment was not activated by blue lights. However, the statute required "as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section." Additionally, the statute allowed court sot consider "any other valid reason for failure to produce the videotape based upon the totality of the circumstances." S.C. Code Ann. § 56-5-2953(B)(2007).

The purpose of the videotaping requirement "is to create direct evidence of a DUI arrest." Roberts, 393 S.C. at 347, 713 S.E.2d at 285. "[T]he videotaping provisions of section 56-5-2953 are mandatory and not optional." Id. at 346, 713 S.E.2d at 285. "A law enforcement agency's failure to comply with [section 56-5-2953] is fatal to the prosecution of a DUI case." Id. In Murphy v. State, 392 S.C. 626, 631, 709 S.E.2d 685, 688 (Ct. App. 2011), this Court explained the plain language of section 56-5-2953(A)(1)(a)-(b) required the video recording to capture "(1) the accused's conduct and (2) Miranda warnings prior to field sobriety tests, if such tests occur." This Court defined "conduct" as one's behavior, action, or demeanor. Id.

In City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007), the Supreme Court held that a violation of the videotaping requirement of section 56-5-2953(A) may result in the dismissal of the charges if no exceptions apply. In light of the trial judge's order not addressing of the exceptions and the prosecution's failure to seek a ruling on the potential applicability of the statutory exceptions, the Court did not review the case to determine if any exceptions applied. Id. at 16-17, 646 S.E.2d at 880-881.

Recently, the Supreme Court examined the videotaping requirement of section 56-5-2953 in State v. Elwell, 403 S.C. 606, 743 S.E.2d 802 (2013). The Court concluded that if a person refuses a breath test, the officer is not required to videotape the twenty-minute pre-test waiting period. Id. In a companion case decided the same day, State v. Hercheck, 403 S.C. 597, 743 S.E.2d 798 (2013), the Court likewise concluded that law enforcement was not required to videotape the entire pre-test waiting period where the arrestee refused a breath test. The Court noted that the "'purpose of section 56-5-2953 is to create direct evidence of a DUI arrest.'" Id. (quoting Roberts, 393 S.C. at 347, 713 S.E.2d at 285). The Court found that when "an arrestee refuses the breath test, the evidence gathering portion is over." Id.

Even more recently, this Court examined the statutory videotaping requirements in DUI cases. State v. Henkel, 404 S.C. 626, 746 S.E.2d 347 (Ct. App. 2013). A motorist called 911 to report an individual driving a truck erratically. The motorist followed the truck until it hit a bridge and overturned into a ditch. The motorist observed the driver run from the scene. An officer arrived and began to search for the driver. Three or four hours later, the officer responded to a call indicating the driver may have been located. The driver was being examined by EMS. The officer got into the ambulance with the driver and could smell alcohol. The officer advised the driver of his rights and performed a sobriety test inside the ambulance. The officer concluded the driver was under the influence and placed him beside his patrol car. The driver failed to recite the alphabet correctly beside the car. The officer then placed the driver inside the car. Then the officer turned on his camera and read the driver his rights again.

At trial, the officer testified that he activated his video camera and microphone by remote after he read his rights to the driver in the ambulance, but before he administered the first field sobriety test. Thus, the evidence presented did not include any video or audio of the initial advisement of rights or any video of the two field sobriety tests. After finding the videotaping equipment was not activated by blue lights, the trial court made a factual finding that the video was activated as soon as practicable. This Court found there was evidence to support the trial court's finding. However, this Court found the video failed to conform to the requirements of section 56-5-2953(A)(1)(b) as required even under 56-5-2953(B) because the video failed to include the officer advising the driver of his rights. Id.

Without question, the prosecution presented no video of Appellant's conduct at the incident site. The trial judge agreed with the prosecutor's argument that although the videotaping requirements applied, the failure to create a video was excused based upon the totality of the circumstances. The record failed to support the conclusion that the officers were not aware of what they were investigating and as a result, the police were not considering the procedural rigors of DUI law. The 911 calls in evidence provide ample support that the police were aware of a potential felony DUI prior to and upon their arrival. Carolina Jones testified that she believed Appellant had been drinking when she arrived at the scene prior to the police arriving. In her call to 911, she informed the dispatcher that she saw a white man near a dead body and the white man was drunk. [6] Additionally, Appellant's father spoke to the 911 dispatcher and explained that he believed his son, whom he identified by name, had hit the person who was lying in the road. The emergency calls alone placed officers on notice that a potential felony DUI was afoot. The first officer on

[6] The recording of the 911 call is on file with this Court.

the scene, Staggers, spoke to Appellant within moments of his arrival. His initial observations of Appellant were that Appellant was unstable on his feet and had "an odor of alcoholic beverages on his person." Staggers concluded quickly that Appellant "had been drinking." R. 130, lines 10-15. Staggers also testified that he identified Appellant as the driver of the white truck that was present on the scene. R. 130, lines 19-23. Recognizing the direction the investigation was taking, Staggers advised Appellant of his rights. R. 130, line 24 – R. 131, line 3. Appellant then gave a statement indicating that the truck ran over Turner after she fell out of it.

When Ballard arrived, he initially spoke to Staggers of what was going on. R. 181, lines 21-24. After speaking with Staggers, Ballard pulled Appellant from the car. He observed Appellant was staggering. R. 183, lines 1-9. Staggers advised Ballard that Appellant was driving the truck on the scene. R. 183, lines 13-17. Ballard further testified that he was in communication with the dispatcher as evidenced by the 911 tape. R. 183, lines 18-21. Based on the observations made by police, Ballard issued Appellant a ticket for DUI. R. 184, lines 23-25; R. 185, lines 2-5. Specifically, Ballard testified the charge was based upon Appellant appearing highly intoxicated and telling Staggers he was driving. R. 188, lines 13-19.

When Boston arrived, he initially spoke to Staggers who relayed all information he had. Boston's understanding was that Appellant was the driver of the truck that ran over Turner. R. 141, line 12 – R. 142, line 3. Boston claimed Appellant admitted to being too drunk to drive and asking Turner to drive. It was while Turner was driving that she fell out of the truck and was run over. R. 143, lines 9-16. When Boston arrived, Appellant was already in the patrol car speaking to Staggers. Boston immediately detected alcohol on

Appellant and noticed his speech was slurred. Boston opined that Appellant was "very intoxicated." R. 144, lines 13-19. Thereafter, Appellant was transported to the police department. R. 145, lines 5-8. Boston admitted that what began as a DUI investigation "morphed into something else." R. 149, lines 6-8. In fact, Boston testified to interviewing Appellant the following day "since he sobered up he would be able to remember what happened." R. 149, lines 19-24.

The record fails to support the trial judge's finding that the totality of the circumstances excused law enforcement's failure to video record Appellant's conduct at the incident site. As demonstrated, the officers had ample notice of the potential felony DUI on the scene, and in fact, arrested Appellant for DUI within minutes of arriving. The failure by law enforcement to create the video denied the jury the ability to assess Appellant's conduct. In light of the fact that law enforcement failed to conduct any chemical testing, which would have provided the jury with objective evidence of Appellant's intoxication or lack of intoxication, the video would have been the only objective evidence for the jury to make a determination concerning whether Appellant engaged in felony DUI.

CONCLUSION

Appellant respectfully requests this Court direct a verdict of acquittal in Appellant's favor on the charge of felony DUI due to the prosecution's failure to videotape Appellant's conduct at the incident site.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of January, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Williamsburg County
George C. James, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARTY BAGGETT,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of January, 2014.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO
before me this 23rd day of January, 2014.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.