STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County
Honorable George C. James, Jr., Circuit Court Judge
Appellate Case Tracking No. 2011-204146

The State, Respondent,

vs.

Marty Baggett, Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. The trial court properly denied the directed verdict motion when the State failed to produce a video and the trial court properly considered the totality of the circumstances in allowing the case to proceed.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court properly denied the directed verdict motion and the motion for a new trial when the State failed to produce a video but the trial court properly considered the totality of the circumstances in allowing the case to proceed.

Appellant contends the trial court erred in denying his motion for directed verdict as to the Felony DUI charge based on the State's failure to provide a proper video recording of Appellant's conduct pursuant to section 56-5-2953(A) of the South Carolina Code (Supp. 2010).[1] First, there is ample evidence in the record to support the trial court's decision to deny the directed verdict as to felony DUI. To the extent the argument is for dismissal of the charge based on the failure to produce a video recording, Section 56-5-2953(B) contains an exception which allows the trial court to consider the totality of the circumstances regarding the failure to produce a video recording. The trial court in this case correctly determined the totality of the circumstances excused the failure to produce a videotape, and he correctly denied Appellant's motion for a directed verdict.

Directed Verdict

Appellant made a motion for directed verdict on the felony DUI charge. The trial court had ample evidence in the record supporting his decision to allow the charge to go forward to the jury. "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a

[1] It should be noted counsel did not raise a motion related to the reckless homicide charge, and that charge is not the subject of any appeal. As a result, his conviction and sentence of ten years on that charge are the law of the case.

directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Pursuant to section 56-5-2945 of the South Carolina Code (Supp. 2010):

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

The State presented testimony demonstrating Appellant was driving the vehicle. First, Officer Staggers testified Appellant was driving the vehicle. (T.153; R.130). Additionally, Investigator Boston indicated Appellant's first story was that Appellant was driving the vehicle. (T.213; R.177). Appellant's story changed to indicate the victim was driving the vehicle. Further, blood stains were found under the passenger door and material was located in the passenger wheel well indicating the victim was struck on the passenger side of the vehicle, and not the driver side, when she fell out of the truck. (T.88-90; 302; R.65-67; 256). The blood tested positive for the victim. (T.306-307; R.260-261).

Most significantly, Appellant has not challenged his conviction for reckless homicide. As a result, the jury's conclusion Appellant was driving in order to convict him of reckless homicide is the law of the case. See S.C. Code Ann. § 56-5-2910(A) (Supp. 2010); State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002) (finding reckless homicide requires proof that the defendant (1) operated an automobile; (2) in reckless disregard for the safety of others; (3) the defendant's conduct proximately caused injury to the victim; and (4) within three years, the victim died as a result of these injuries).

Numerous witnesses testified Appellant was intoxicated both at the time of the discovery of the accident and at his arrest. Most significant is the testimony of Carolina Jones, the woman who first came across Appellant and the victim. She testified she came across the truck blocking the road and Appellant indicating he found a dead body. She asked him if he had called 911, and he said no. She testified he was "kind of drunk," "staggering around," and "repeating the same thing over again." She testified she believed he was under the influence of alcohol. (T.129-130; R.106-107).

Officer Staggers was one of the initial officers to arrive on scene. He testified he spoke with Appellant. He indicated Appellant "had a[n] odor of alcoholic beverages on his person. He had been drinking." (T.152-153; R. 129-130). He also testified Appellant was "unsteady on his feet." (T.160; R.137).

Investigator Boston arrived at the scene and also talked with Appellant. He indicated Appellant claimed to be too drunk to drive so the victim was driving. (T.177; R.143). Investigator Boston further testified he could smell alcohol on Appellant, Appellant's "speech was slurred," and Appellant was "slouched down in the back of the patrol car." He then stated: "I was advising him of his Miranda Warnings and he blurted

out I know my rights and to me he was very intoxicated." (T.178; R.144). Investigator Boston testified based on his experience, Appellant was intoxicated. (T.179; R.145). He indicated the basis for the original DUI charge against Appellant was Appellant's admission he was drinking. (T.182; R.148). Investigator Boston also took a statement from Appellant's father who described his son as "crazy and drunk." (T.189; R.153). Appellant's father then told Investigator Boston Appellant indicated "he had run over [the victim]." (T.189; R.153). Finally, Investigator Boston testified Appellant did not appear in shock at the scene of the homicide, instead he appeared intoxicated. (T.214; R.178).

The State presented evidence Appellant was driving the truck while intoxicated. The victim died as a result of Appellant's failure to exercise due care while driving intoxicated. The cause of death was found to be blunt force trauma from being run over. (T.259-261; R.222-224). As a result, the State presented sufficient evidence to sustain the trial court's decision to deny the motion for a directed verdict.

Dismiss for Failure to Produce Video

Appellant seems to maintain the felony DUI charge should have been dismissed because no video recording of the incident site or breath test site was produced. At the incident site, the officers were not investigating a DUI, but were instead investigating a possible homicide. Further, it was never practicable to begin video recording or to offer Appellant field sobriety tests. Finally, the officers did not offer a breath test, and so no breath test site video need be produced.

Pursuant to section 56-5-2953:

> (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.

(2) The videotaping at the breath site:

(a) must be completed within three hours of the person's arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 or a probable cause determination that the person violated Section 56-5-2945, unless compliance is not possible because the person needs emergency medical treatment considered necessary by licensed medical personnel;
(b) must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test;
(c) must include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test;
(d) must also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to videotape this waiting period. However, if the arresting officer administers the breath test, the person's conduct during the twenty-minute pre-test waiting period must be videotaped.

The videotapes of the incident site and of the breath test site are admissible pursuant to the South Carolina Rules of Evidence in a criminal, administrative, or civil proceeding by any party to the action.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2010).

Additionally, the statute provides:

> [I]n circumstances including, . . . traffic accident investigations . . . where an arrest has been made and the

> videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal. However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section.

S.C. Code Ann. § 56-5-2953(B) (Supp. 2010).

The testimony at trial, as well as the facts and circumstances of the scene, indicated the officers were investigating a homicide or accident and not a DUI. Clearly, this was not a routine traffic stop in which the provisions and requirements of 56-5-2953(A) automatically apply. The officers investigated a report of a dead body and not a DUI.

There was no testimony regarding when it was practicable for the officers to initiate video recording given the nature of the scene and the fact they believed they were investigating either an accident or a homicide, not a felony DUI. There were numerous individuals on scene, including Appellant's family. (T.161-162; R.224-225). The officers were more interested in securing the scene and investigating the homicide then they were a DUI. (T.77; 160; 198; 208; 211; 218; R.54; 137; 162; 172; 175; 182). Significantly, when asked about conducting field sobriety tests, Officer Staggers testified: "it was not safe to conduct that at the time." (T.160; R.137).

Officer Scott responded to a call that a person was possibly run over by a vehicle. (T.77; R.54). Appellant's counsel asked Officer Scott: "You were there that night and you were going to determine whether this was an accident or a murder. Isn't that correct?" Officer Scott indicated he was merely there to process the scene for evidence. (T.95; R.72). Later he was asked by Appellant's counsel: "That night you processed the scene like it might be a murder, correct?" Officer Scott responded: "I don't know what

we had at the time . . . Processing the scene, it was based on what we had." (T.98-99; R.75-76). Counsel's questions and Officer Scott's responses demonstrate why this was not a typical DUI investigation or even a DUI investigation after a traffic accident. This scene was considered more of a possible murder scene.

Investigator Boston testified he was initially investigating a murder. (T.198; R.162). He specifically testified: "I was concentrating on the murder." (T.208; R.172). He was not investigating a DUI and so he had no reason to institute the protocols for a DUI investigation instead of the much more serious murder investigation. When questions about Williamsburg County Sheriff's Department's failure to follow the law regarding a DUI, he indicated he "can't say not following the law . . . to investigate a murder." (T.211; R.175). Clearly, the officers on the scene did not believe at the time they were investigating a DUI or a simple traffic accident. Instead they were investigation a possible homicide and so the video recording of the incident scene was not necessary.

Further, under the totality of the circumstances, the trial court properly allowed the trial to continue even taking into account the failure to produce a video recording of the incident scene. Witness testimony clearly indicated Appellant's intoxication. The scene dictated an investigation as a possible homicide and not for DUI. Further, Appellant made his motion after the State's case was presented as a directed verdict motion and not as a motion to dismiss in which the State could present additional testimony from the officers to explain why they did not follow the statute. As a result, the trial court properly considered the totality of the circumstances in allowing the trial to proceed and in denying Appellant's motion for dismissal or directed verdict.

Additionally, the State did not conduct a breath test and so no breath test site video need be produced. As the Supreme Court found:

> There is no indication from the plain language of the statute (Section 56-5-2950 of the South Carolina Code) that the Legislature intended to encumber arresting officers with an affirmative duty to offer breath tests to all persons arrested for driving under the influence who physically are capable of providing a breath sample.

State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993). The Court further explained: "We hold that arresting officers are not required to offer breath tests to persons charged with driving under the influence of alcohol as a prerequisite to prosecution. This result uniformly has been reached by other courts addressing this issue." Id. at 513, 427 S.E.2d at 672.

Further, the analysis of this Court and the Supreme Court in determining whether to record the twenty minute pre-test waiting period when not test is given would be analogous. See State v. Elwell, 403 S.C. 606, 743 S.E.2d 802 (2013); State v. Elwell, 396 S.C. 330, 333, 721 S.E.2d 451, 452 (Ct. App. 2011). This Court explained the purpose of the recording at the breath test was to ensure the reliability of the breath test and to reduce the number of swearing contests regarding the reliability of the test offered. Elwell, 396 S.C. at 336, 721 S.E.2d at 454. If no breath test is offered, then there clearly is no basis for requiring the video recording of the breath test site.

Accordingly, the trial court properly concluded the failure to produce a video recording of the incident and breath test sites did not require dismissal of the felony DUI charge.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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January 10, 2014

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 10th day of January 2014.

Sally Ellison

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