

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County General Sessions
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2016-001639

RECEIVED
JUN 28 2019
SC Court of Appeals

State of South Carolina

Appellant,

vs.

Tony Latrell Kinard

Respondent.

PETITION FOR REHEARING

Pursuant to Rules 240 and 242(c), South Carolina Appellate Court Rules, the Respondent, Tony Latrell Kinard petitions for rehearing of this matter. The grounds for this petition are as follows:

ISSUE NOT PRESERVED FOR APPELLATE REVIEW

The Appellant argued the trial court erred in not finding compliance with §56-5-2953(A) was excused under the §56-5-2953(B) “totality of the circumstances” provision. Respondent submits that the Appellant did not properly preserve the totality of circumstances issue for appeal. At the original trial, Respondent made a motion to dismiss this case for the State’s failure to comply with S.C. Code §56-5-2953(A). In its consideration of the motion, the trial court did consider subsection (B) “totality of the circumstances” in its analysis and the Appellant made a general reference subsection (B) of the statute. But the Appellant did not specifically argue totality of the circumstances and properly preserve it for appeal.

In this case, wherein there was a traffic collision, the Appellant specifically argued the traffic accident investigation section of the statute only. South Carolina Code §56-5-2953(B) states in relevant part that:

In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. [emphasis added]

In the present case, there is a complete video and therefore it must, “conform with the provisions of this section.” The trial court specifically found that there was a full and complete video.

The Appellant raised its argument on the grounds of the totality of the circumstances for the first time on appeal. In order to preserve this issue for appeal the Appellant would have had to have stated it with sufficient specificity at the trial level, which was not done.

APPELLATE COURTS STANDARD OF REVIEW

In criminal cases, the appellate court sits in review of errors of law only and is bound by the trial court’s factual findings. The trial court’s finding of facts related to this case should not be disturbed if the trial Court didn’t abuse its discretion and it’s finding of facts are supported by evidence.

In this case, the trial court specifically found 56-5-2953(B) was not applicable as it relates to the specific facts of this case. While the trial court found that there was evidence of the Respondent being belligerent with Newberry Deputy Snelgrove prior to the arrival of Trooper Barnett, the arresting officer, the trial court made a specific finding there was no evidence or testimony to support Respondent’s alleged belligerent demeanor or aggressive attitude at the

time Trooper Barnett began his investigation and questioning of Respondent. [R. p 4 and 9]
Trooper Barnett arrived well after the fire department and emergency medical services had left the scene. It was the Trooper's conduct that kept the Respondent from appearing on the videotape since the Trooper never even asked Respondent to exit the vehicle.

In its opinion, this Court did not find that the trial court's finding of fact concerning the applicability of §56-5-2953(B) in this case was erroneous or unsupported by the evidence, but rather "found" a new set of facts to support the application of §56-5-2953(B) under the totality of the circumstances exception. The trial court specifically found there was no evidence to support the contention that the Defendant was in fact unruly, combative, or uncooperative at the time that the Trooper read the Miranda rights. [R p. 4, 9]

SOUTH CAROLINA CODE §56-5-2953(B) IS NOT APPLICABLE TO THIS CASE

South Carolina Code §56-5-2953(B) states:

(B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the

video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

South Carolina Code §56-5-2953(B) provides specific exceptions for times when the failure by the arresting officer to produce a video recording would not be grounds for dismissal. The first one exception is when the arresting officer submits an affidavit certifying that the video equipment was not working. In the present case, this exception was not applicable because the arresting officer's video camera was working and a video recording was made. However, the video recording failed to comply with S.C. Code §56-5-2953(A).

The second exception is when it was physically impossible to produce a video recording because the person needed emergency medical attention or exigent circumstances existed. In the present case, this exception is not applicable because there were no one needed medical attention, the fire department and emergency medical services had been to the scene and had left. There were no exigent circumstances to support this exception. As stated above, there is a video recording of the incident, however, the video recording failed to comply with S.C. Code §56-5-2953(A).


The third exception is for circumstances including roadblocks, traffic accident investigations, and citizens arrest, where an arrest has been made and the video recording equipment has not been activated, provided however, as soon as video recording is practicable in these circumstances, video recording must begin and conform to this section. In the present case, while this was a traffic collision, there is a video recording of this incident that began as soon as

practicable and recorded the entire event, however, despite the completeness of the recording it has failed to comply with S.C. Code §56-5-2953(A).


The fourth exception is any other valid reason for the failure to produce video based upon a totality of the circumstances. In the present case, this exception is also inapplicable because the trial court specifically found that there was no evidence in the record to support the use of this exception. [R p. 4 and 9]. This court did not find the trial court's findings of fact concerning the provisions of this exception to be erroneous. Therefore, this court is bound by the trial court's finding of fact.

WHEREFORE, for the aforementioned reasons, Respondent respectfully requests that the trial court's Final Order of Dismissal should be reinstated and affirmed by the Court of Appeals.

June 28, 2019



Michael Lambshire
455 St. Andrews Road, Suite E-1
Columbia, SC 29210-4487
(803) 708-4755



Richard Dolce
455 St. Andrew Road, Suite E-2
Columbia, SC 29210-4487
(803)772-7411

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 28 2019
SC Court of Appeals

Appeal from Newberry County
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case Tracking No. 2016-001639

State of South Carolina

Appellant,

vs.

Tony Latrell Kinard

Respondent.

PROOF OF SERVICE

I, Michaela Kirk, certify that I have served the within Petition for Rehearing on the Appellant by depositing three copies of the same in the United States mail, postage prepaid, addressed to:

Alan Wilson
Attorney General

William M. Blich, Jr.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

David M. Stumbo
Solicitor, Eighth Judicial Circuit

MA I further certify that all parties required by Rule to be served have been served. This day of June, 2019.



Michaela Kirk, Paralegal
Laubshire Law Firm, LLC
455 St. Andrews Road, Suite E-1
Columbia, SC 29210
(803) 708-4755

THE LAUBSHIRE LAW FIRM, LLC

455 Saint Andrews Road, Suite E-1
Columbia, SC 29210-4487

Phone: (803)708-4755

Fax: (803)708-4888

June 28, 2019

RECEIVED
JUN 28 2019
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: The State v. Tony Latrell Kinard
Appellate Case No: 2016-001639

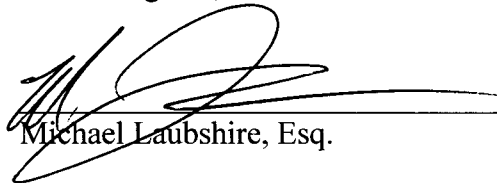
Dear Ms. Kitchings:

Enclosed for filing please find an original and six (6) copies of Respondent's Petition for Rehearing in the above-captioned matter.

Please file the original and copies necessary for SCACR compliance and return the extra copy to me with an affixed clerk's date of filing in the enclosed self-addressed stamped envelope.

Thank you for your cooperation in this matter.

In kind regards,


Michael Laubshire, Esq.

Enclosures

cc: Alan Wilson, Attorney General
William M. Blicht, Jr., Assistant Attorney General
David M. Stumbo, Solicitor, Eighth Judicial Circuit