

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

RECEIVED
JUL 09 2019
SC Court of Appeals

State of South Carolina,

Appellant,

vs.

Tony Latrell Kinard,

Respondent.

RETURN TO PETITION FOR REHEARING

On June 19, 2019, this Court reversed the trial court's decision dismissing the underlying DUI case and remanded for a new trial. However, this Court affirmed the trial court's determination that the State failed to provide a proper video under section 56-5-2953(A) of the South Carolina Code. On June 28, 2019, Respondent filed his Petition for Rehearing. This Return follows.

Initially, the State submits consideration of section 56-5-2953(B) of the South Carolina Code is preserved for review on appeal. The Subsection was discussed numerous times at the hearing in regards to general discussions of the circumstances of the case and specifically in considering the impact that the case resulted from a traffic accident and not a typical traffic stop. The initial discussion by the State is to detail the circumstances of the case. (R.22). Further, the State specifically references subsection (B) on page 35 in its discussion of the circumstances of the case. The State continues its argument regarding the specific circumstances which lead to the failure to have Respondent on camera at the time he is read his Miranda Rights. (R.51-52).

Significantly, the trial court's order specifically addresses subsection (B), finding there is no evidence of a subsection (B) exception. (R.4). The State reiterates its belief the subsection applies during the argument on the Motion to Reconsider. (R.92-94). Again, the issue is ruled on by the trial court in its order. (R.9-11). As a result, the issue is properly preserved for review on appeal. See e.g., Jean H. Toal, Amelia W. Walker & Margaret E. Baker, Appellate Practice in South Carolina 185 (3d ed. 2016) ("There are four basic requirements to preserving issues at trial for appellate review. . . . [T]he issue must have been (1) raised to and ruled upon by the [trial] court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the [trial] court with sufficient specificity.").

Additionally, this Court properly concluded Subsection (B) was directly implicated by the facts and circumstances of this case and found the trial court erred as a matter of law by finding the subsection inapplicable. Subsection B of the statute provides:

In circumstances including, but not limited to, . . . , traffic accident investigations, . . . 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.

S.C. Code Ann. § 56-5-2953(B) (2014). The subsection was addressed by the South Carolina Supreme Court in State v. Henkel, 413 S.C. 9, 774 S.E.2d 458 (2015). The Supreme Court interpreted the above subsection and concluded, "the phrase 'as soon as videotaping is practicable in these circumstances,' applies to both when videotaping must 'begin' and when videotaping must 'conform to the provisions of this section.'" Henkel, 413 S.C. at 15, 774 S.E.2d

at 462.¹ As a result of the Supreme Court's interpretation, the conformity must begin as soon as practicable, and not just begin upon the start of video recording. Further, this view is consistent with the legislative purpose as explained by the Supreme Court: "Here, the legislative concerns with videotaping one-on-one traffic stops to capture the interactions between an officer and the subject are not present. See Sweat, 386 S.C. at 350, 688 S.E.2d at 575 (holding 'language must be construed in light of the intended purpose of the statute.')." Id. As in Henkel, in this case numerous officers and emergency personnel observed Respondent's conduct at the scene. Individuals not associated with law enforcement or first responders also witnessed Respondent's conduct. Additionally, Trooper Barnett specifically noted the strong odor of alcohol on Respondent's person.

In the instant case, if this Court finds the video recording presented failed to conform because it does not "show" Respondent then it was not practicable to conform to the requirements and, under subsection (B) and the Supreme Court's interpretation in Henkel, the failure to conform would not require dismissal. A review of the testimony and video in this case clearly demonstrates why it was not possible to conform and demonstrates the error of Judge Hocker's decision. Deputy Snelgrove testified Respondent was in handcuffs and placed in his vehicle because he was under arrest for disorderly conduct. (6/8T.28; 35; R.39; 46). On the video, Deputy Snelgrove clearly informs Trooper Barnett upon the Trooper's arrival that Respondent was in the Deputy's car because he was making threats to the Deputy and other individuals. (Video of Incident Scene). Further, when Trooper Barnett makes initial contact with Respondent, he refuses to answer any questions or to address the Trooper, thereby demonstrating a lack of cooperation. (Video of Incident Scene). Trooper Barnett testified:

¹ While Henkel involved the 2008 version of the statute, the language of subsection (B) has remained essentially unchanged.

I got back here to talk to Mr. Kinard to get my initial accident investigation out of the way. Mr. Kinard was staring straight ahead. He will not speak to me. He's doing that thousand-yard stare. Based on that, I didn't pull him out of the vehicle, because I didn't want to pull him out of a controlled situation and put him in an uncontrolled situation just to put him on camera.

(6/8T.27; R.38). When asked whether he ever asked Respondent to get out of the vehicle, Trooper Barnett responded: "Based on demeanor; no, sir." (6/8T.28-29; R.39-40). The Trooper further explained: "I would say the thousand-yard stare would be considered an aggressive stance or a stance that leads me to believe that something else could happen if I was to get him out of the car, sir." (6/8T.30; R.41). Shortly after Respondent is read his Miranda rights and placed under arrest for DUI, he begins to act unruly in the backseat of Deputy Snelgrove's vehicle. He tries to get out of the back of the vehicle, uses profanity, and continues to express his belief he is God. (Video of Incident Scene). The only evidence in this Record indicates Respondent was not cooperative and it is absurd to require Trooper Barnett to remove Respondent from the vehicle for the purpose of advising him of Miranda and placing him under arrest, solely to return him to the vehicle. As a result, it was not practicable to conform to the requirements of Subsection (A) because of Respondent's behavior and interactions with the officers.

Additionally, Subsection (B) allows the trial court to consider the totality of the circumstances in determining whether to dismiss the case or whether to excuse any failure to conform. S.C. Code Ann § 56-5-2953(B) ("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 . . ."). In this case, the circuit court failed to consider the totality of the circumstances and committed an error of law in concluding Subsection (B) did not apply. The totality of the circumstances, most notably the facts 1) Respondent was already under arrest

for disorderly conduct; 2) he in handcuffs and in the back of a patrol vehicle based on his behavior and an aggressive, threatening stance toward the Deputy and other individuals at the scene; 3) he refused to cooperate with Trooper Barnett; and 4) the conditions of the scene; justify the actions of the Trooper and excuse the failure to remove Respondent from the vehicle solely for the purpose of advising him of his Miranda rights and placing him under arrest. The futile act of removing him, only to place him back in the patrol car after exposing the officers to the risk associated with a highly intoxicated individual who has already expressed a God complex and took a threatening posture with one deputy, should not require dismissal of the case under the totality of the circumstances.

CONCLUSION

For all of the foregoing reasons, the State submits Respondent's Petition for Rehearing should be denied because this Court correctly determined section 56-5-2953(B) was applicable under the facts and circumstances of this case and the trial court committed an error of law and was without any factual support in determining otherwise.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

July 9, 2019

STATE OF SOUTH CAROLINA

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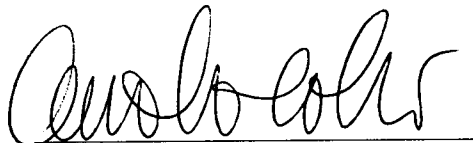
PROOF OF SERVICE

I, Carolina Collins, certify that I have served the within Return to Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Michael V. Laubshire, Esquire
455 St. Andrews Road, Suite E-1
Columbia, South Carolina 29210-4487

Richard J. Dolce, Esquire
Post Office Box 4403
Irmo, South Carolina 29063

I further certify that all parties required by Rule to be served have been served.
This 9th day of July, 2019.



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ALAN WILSON
ATTORNEY GENERAL

July 9, 2019

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VIA HAND DELIVERY

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

Re: State v. Tony L. Kinard,
Appellate Case No. 2016-001639

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of the Return to Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

William M. Blich, Jr.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

Enclosures

cc: Michael V. Laubshire, Esquire (copy enclosed)
Richard J. Dolce, Esquire (copy enclosed)
Victim Advocacy Division (copy enclosed)