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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Newberry County
Hon. Donald B. Hocker, Circuit Court Judge

State of South Carolina, Petitioner,

v.

Tony Latrell Kinard, Respondent.

APPENDIX

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ATTORNEYS FOR RESPONDENT

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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

State of South Carolina, Appellant,

vs.

Tony Latrell Kinard, Respondent.

RECORD ON APPEAL

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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF GENERAL SESSIONS**
	)	**FOR THE EIGHTH JUDICIAL CIRCUIT**
COUNTY OF NEWBERRY	)	
State of South Carolina,	)	
	)	Ticket No.(s): H390372 & H390373
	)	Indictment No.: 2016-GS-36-0107
v.	)	
Tony Latrell Kinard,	)	**ORDER**
Defendant.	)	

FILED
NEWBERRY COUNTY
2016 JUL 29 AM 11 43
JACKIE S. BOWERS
CLERK OF COURT

Date of Hearing: June 7, 2016
Judge: The Honorable Donald B. Hocker
Attorney for State: Taylor Daniel and Dale Scott
Attorney for Defendant: Michael Laubshire

This matter came before the Court on June 7, 2016, on the Defendant's motion to dismiss the charge of Driving Under the Influence, based upon the State's failure to comply with the mandatory videotaping requirement of S.C. Code Ann. §56-5-2953(A)(1)(a) iii) at the incident site. Present at the hearing was the Defendant and his attorney, Michael Laubshire, Taylor Danial, Assistant Solicitor for the Eighth Judicial Circuit and Dale Scott, Deputy Solicitor the Eighth Judicial Circuit, Trooper Burnett, South Carolina Highway Patrol and Deputy Snellgrove, Newberry County Sheriff's Office. As part of the hearing, the Defendant called witnesses, Trooper Burnett and Deputy Snellgrove and introduced into evidence the videotape from the incident site.

FINDING OF FACT

On or about November 3, 2015, at approximately 6:30pm, Trooper Barnett responded to a wreck on the I-26 west bound exit ramp at exit 74. Prior to his arrival on scene Trooper

Barnett activated his in-car video camera. Newberry County Deputy Snellgrove was already on scene and had detained the Defendant by placing him in handcuffs and in the rear of his patrol vehicle. The Defendant never physically appears on Trooper Burnett's at-scene video because he is handcuffed and in the rear of Trooper Snellgrove's car. Deputy Snellgrove does not have any recording of this incident because his vehicle was not equipped with a video camera. Deputy Snellgroves blue lights are flashing during the entire video making it difficult to see what is happening on the video. No field sobriety tests are conducted at the scene. The Defendant is never taken out of Deputy Snellgrove's vehicle, therefore, the arrest of the Defendant is not on the video and the Defendant is not shown being advised of his Miranda Rights.

CONCLUSIONS OF LAW

Pursuant to the provisions of S.C. Code Ann. §56-5-2953, as amended, a person charged with driving under the influence must have their conduct recorded as follows:

> S.C. Code Ann §56-5-2953: Incident site and breath test site video recording
> (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 video recorded.
> (1)(a) The video recording at the incident site must:
> (i) not begin later than the activation of the officer's blue lights;
> (ii) include any field sobriety tests administered; and
> **(iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.**
> (b) A refusal to take a field sobriety test does not constitute disobeying a police command.
> (2) The video recording at the breath test site must:
> (a) include the entire breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test;
> (b) include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test; and

(c) 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 video record this waiting period.
(3) The video recordings 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.
(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.
HISTORY: 1998 Act No. 434, Section 9; 2000 Act No. 390, Section 23; 2003 Act No. 61, Section 8; 2008 Act No. 201, Section 11, eff February 10, 2009.

The Statutory construction of this section has been litigated extensively throughout South Carolina. In constructing the terms of a statue, the primary rule of statutory construction is that a statute should be construed to give the effect to the intent of the legislature. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E. 2d 278 (2011); City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007); and State v. Johnson, 393 S.C. 182, 720 S.E.2d 516 (Ct. App.

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not include the arrest of the defendant nor did it show the Defendant being advised of his Miranda rights. There is nothing in the record to suggest that S.C. Code Ann. §56-5-2953 subsection (B) applies since a video tape from the arresting officer was produced and began recording prior to his arrival on scene. The Defendant was in the back seat of Deputy Snellgrove's patrol car when Trooper Burnett places him under arrest and advises him of his Miranda rights. The rights can be heard but the Defendant is not visible and because of the flashing blue lights on Deputy Snellgrove's patrol car the trooper is barely visible. Trooper Burnett testified he was standing in the apex of the door when he read the Defendant his rights.

Since there is no evidence of a S.C. Code Ann. §56-5-2953 subsection (B) exception, the appropriate remedy for the violation of section (A) of this statute is dismissal of the charge. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (S.C. 2011); The Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011); State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (S.C. 2012).

IT IS THEREFORE ORDERED that:

That based upon the above stated findings of fact and conclusions of law, the Court hereby dismisses this matter.

IT IS SO ORDERED!

7-25, 2016
Laurens, South Carolina

Donald B. Hocker

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF NEWBERRY	)	
State of South Carolina,	)	Indictment No. 2016-GS-36-0107
v.	)	**ORDER**
Tony Latrell Kinard,	)	
Defendant.	)	

Date of Hearing: **July 25, 2016**
Presiding Judge: **~~The Honorable~~ Donald B. Hocker**
Attorney for State: **Assistant Solicitor Taylor Daniel**
Attorney for Defendant: **Michael V. Laubshire**
Court Reporter: **Margaret Woods**

This matter comes before me on the State's Motion for Reconsideration of my June 8, 2016[1] verbal order and subsequent July 25, 2016 written order dismissing the above-captioned indictment based on the factual circumstances of the case and the provisions of Section 56-5-2953, South Carolina Code of Laws, 1976 (as amended) (which hereinafter may be referred to as, "the statute'.) At the call of the case, present before the Court are Assistant Solicitor Taylor Daniel on behalf of the State and Michael Laubshire, assisted by Richard J. Dolce, on behalf of the Defendant. I note that the Defendant was also present for the hearing.

As a preliminary matter, at the call of the case, the Defense took the position that the State's Motion for Reconsideration had not been properly signed or served in accordance with the South Carolina Rules of Civil and Criminal Procedure. However, the Defense also stipulated that, upon the proper signing of the Motion by the Assistant Solicitor, it would accept personal service of the Motion by him and waive any notice period so as to allow the hearing on the State's Motion for Reconsideration to take place as scheduled. This was accomplished.

With that matter resolved, the hearing on the State's Motion for Reconsideration of my previous orders proceeded. I note that during the hearing I allowed both the State and the

1 In my July 25, 2016 written order the date of the hearing of the case and my verbal order concerning it was incorrectly shown as June 7, 2016. The correct date of the hearing and that verbal order was June 8, 2016, as has been verified with the Office of the Clerk of Court of Newberry County.

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Defense considerable latitude in presenting their position to me. I allowed, over the objections of the Defense, the State to present for my consideration documents that were not presented and to raise issues that were not raised during the June 8, 2016 hearing on the Defense Motion to Dismiss. My purpose in doing so was to allow both sides the opportunity to fully present to me their view of what I should consider in reaching my decision in this matter.

Discussion

1. As set forth in more detail herein, after careful consideration of the arguments presented by both parties, I am denying the State's Motion for Reconsideration. To the extent that my July 25, 2016 order sets forth my Findings of Fact and Conclusions of Law concerning the Defense's Motion for Dismissal in this matter, those findings and conclusions are incorporated and included herein.

2. The State frames the primary issue in its Motion for Reconsideration as follows:

> At issue in this case is whether the State adequately met the requirements of showing the Defendant Kinard was properly advised of his Miranda rights. The State contends that Trooper Barnett's video provides more than adequate evidence that the Defendant Kinard was clearly read his Miranda warnings as required by Section 56-5-2953. At pretrial argument, the Court equated the word 'show' with the word 'see'. The ruling for dismissal was based on the fact that the Defendant Kinard could not been seen while the trooper was reading him his Miranda rights.

The State then asserts that one can see Trooper Barnett reading Miranda rights while the Defendant was sitting in the back of Deputy Snelgrove's car. In its Motion, the State goes on to assert that:

The fact that Defendant Kinard was read his Miranda rights by Trooper Barnett is convincingly **apparent** and **clear** in the video produced by the State. Defendant Kinard is not visibly present on the video recording at the exact time his Miranda rights were read; however, when viewed as a whole, the video evidence clearly proves that he was present at the time and therefore was properly advised of his rights. (Emphasis in the original).

The State further goes on to assert that, "Black's Law Dictionary defines 'show' as 'to make (facts, etc.) apparent or clear by evidence; to prove." The State also argues that:

the Defendant Kinard, "... had shown himself to be belligerent and aggressive before being placed in the back of Deputy Snelgrove's car. If the Court interprets [the statute] to require that he been 'seen' while being read his Miranda warnings, it would in effect have required that Trooper Barnett physically remove a potentially combative detainee from the car and have him

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stand on an exit ramp off of the interstate. Clearly this would have been impracticable, inadvisable and dangerous for both the Defendant and law enforcement."

The State goes on to argue:

> There are multiple reasons as to why this literal reading of the statute is impractical, including the following: an incident wherein the Defendant is injured and placed in an ambulance prior to law enforcement arrival or the foreseeable likelihood of the Defendant running from the scene and having to be subdued some distance away from the car.

3. In its common use in the English language the word "show" can take on many forms. It may be a noun as, for example, a demonstrative display such as "show strength," or as a display arranged to arouse interest or stimulate sales, or even as a radio or television program. The word may also be verb, as in "to cause or permit to be seen" or to "display for the notice of others," or "to reveal by one's condition, nature or behavior." (Webster's Ninth New Collegiate Dictionary). In the context of the statute at issue, the word "show" is clearly used as a verb, and therefore can be interpreted as meaning, "to cause or permit to be seen." The State concedes that, " — the Defendant was not visibly present on the video recording at the exact time his Miranda Rights were read." In fact the Defendant was not visibly present at any time in the video recording presented by the State. Therefore, I conclude that, in the context of this statute at issue, the word "show" in the phrase, "... and show the person being advised of his Miranda rights ..." (SC Code of Laws, Section 56-5-2953(A)(1)(a)(iii) (1976 as amended)) means to cause or to permit the person being advised of his Miranda rights to be seen. This interpretation is consistent in the entire context of the statute, and with the Circuit Court cases and Appellate Cases presented to me by the Defense, all of which include the requirement that the defendant's entire body be seen in the video made during the arrest and testing process.

4. In response to my question as to whether, if the video did not properly show the Defendant being told his Miranda rights, there was any alternative other than to dismiss the case, the State replied that the proper alternative would be to suppress the video. The Appellate courts have not required the video recording to be "perfect." The fact that a part of the video is blurred or poor quality might not be enough to cause a dismissal of the case, as for example was the situation in State v. Gordon, 414 S.C. 94 (2015). The appropriate remedy in that situation was determined to be, at worst (from the State's point of view), the suppression of the video However, in Gordon there was a video in which a person who can be clearly seen as being the

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Defendant was visible while undergoing field sobriety testing. In this case, all that can be seen on the video is the Trooper standing at the door of the deputy's car and reading Miranda rights. As stated above, the Defendant, who is said to be in the back seat of the Deputy's car, is not in any way visible.

5. It is clear that the purpose of the video recording provision of the statute is to create direct evidence of the arrest and testing process so as to allow the finder of fact to view that process and make an independent decision as to whether or not the advisement of Miranda rights was properly administered, acknowledged, and understood and that the testing process was properly administered and properly performed. It is also clear this video does not "cause or permit to be seen" the Defendant while he is being advised of his Miranda rights and therefore does not provide the opportunity to make such an independent decision.

6. During the course of argument on the Motion for Reconsideration, I questioned the State as to whether or not either the Deputy or the Trooper had offered to assist the Defendant in getting out of the car so that he could be visible on the video while being read his Miranda rights. In the hearing on the Motion to Dismiss, there was testimony that the Defendant earlier had been belligerent and combative, and there was testimony that the Trooper observed the Defendant to have a, "1,000 mile stare," but there is no testimony concerning his demeanor and attitude at the time the Trooper could be seen reading the Miranda rights advisement. The audio portion of the video recording indicates that the Defendant does not respond to the Trooper's questions concerning the Miranda rights advisement. Without being able to see the Defendant on the video it is not possible to determine if he actually heard and understood his Miranda rights. I conclude that the legislative intent of the statute is that the defendant be visible on the video recording during the whole process of a DUI arrest, including the reading of the Defendant's Miranda rights and the field sobriety tests (if any). I therefore conclude that allowing a video recording in which only the Trooper can be seen during reading to the Defendant of his Miranda rights would lead to an interpretation of the statute that would, "... lead to a result so plainly absurd that it would not have been intended by the Legislature or would defeat the plain legislative intention." Mt. Pleasant v. Roberts, 393 S.C. 332 at 342-343, 713 S.E. 2d 278 at 283 (2011).

7. Concerning the issue of the risk and or danger that might have been involved in "forcing" the defendant out of the car so that he could be seen on video, there is no evidence in

this case that, at the time the Trooper recited the Miranda rights, the Defendant would have continued to be uncooperative and present a threat to the law enforcement officers or to himself. While it is certainly possible that in a similar situation there may be a Defendant that continues to be belligerent or uncooperative, this case is limited by the facts presented, and those facts do not shed any light on the Defendant's lack of willingness to cooperate in the proper video recording of the Miranda warning sequence. There is, in this case, no evidence that the Trooper would have had to, " — wrestle the man back to the camera before Miranda is offered" as posited in the States' Motion before me at this hearing.

8. The State cites the exigent circumstances provision of Section 56-5-2953(B) as allowing the case to proceed with the existing video. My previous ruling on this issue is that, because a video recording exists in this matter, Section 56-5-2953(B) does not apply. However, even assuming that it did apply, and that exigent circumstances existed such that the officers believed that attempting to remove the defendant from the back of the deputy's vehicle so that he could be fully seen on the videotape receiving his Miranda rights warning was not feasible or too dangerous, no affidavit was submitted by the officers concerning those circumstances as required by the statute. Further, as noted above, 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.

9. In its argument, the State cites the case State v. Henkel, 413 S.C. 9, 744, S.E. 2d 248 (2015) wherein the South Carolina Supreme Court granted the State's petition for a Writ of Certiorari to review the Court of Appeals' opinion that found that the trial court should have dismissed Defendant's DUI charge because the videotape did not comply with the statutory requirements for videotaping the Defendant's conduct at the scene of his DUI arrest. The factual situation in that case was that a vehicle had been observed driving erratically and ultimately wrecking. When police responded to the wreck, they learned from a witness that the driver had fled from the scene. Several hours later, the driver was located and, when the police arrived, was receiving medical care in an ambulance. The while the Defendant was in the ambulance, the arresting officer administered the Miranda rights advisement to him and conducted a field sobriety test, both of which were captured on an audio recording device, but not a video recording device. However, after later in the arrest sequence, the defendant was placed in the

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arresting officer's patrol vehicle. The in-car camera was faced towards him, and the officer read the defendant his Miranda rights again, all of which was recorded by the camera. The trial court denied the Defendant's motion to dismiss, recognizing that this incident was not a typical DUI stop, and that the officer's investigation began hours after the wreck. The South Carolina Court of Appeals reversed, finding that the DUI charge should have been dismissed because the videotape did not comply with statutory requirements for videotaping respondent's conduct at the time of his DUI arrest. The case was decided under the statute as in existed in January, 2008. Under the facts of the case, the Court concluded that the Miranda rights advisement was given prior to the time that video recording became practicable. In the case at hand, video recording began as soon as the Trooper arrived, which was before the Miranda rights advisement to the Defendant was conducted. Thus, the arrival of the Trooper is the time that the video recording became practicable. Once video recording becomes practicable, the video recording then must comply with Subsection (A) of the statute. ("We find the language of the exception in subsection (B) ambiguous and construe the exception to require compliance with subsection (A) when it becomes practicable to begin videotaping." Henkel, 774S.E.2d at 461). In this case, after video recording became practicable, the Miranda warnings were given but not recorded in compliance with the requirements of Subsection (A). I note that the statute was amended in 2009, but the amendments did not alter the requirement that once the video recording starts, full compliance with Subsection (A) is required.

9. I also reviewed State v. Manning, 734 S.E. 2d 314, 400 S.C. 257 (2012) which was cited by the State. In that case, at the time the investigating officers arrived, the Defendant had been taken to the hospital. Therefore, there were no field sobriety tests or Miranda warnings to be given at the accident site and Subsection (A) was inapplicable because the investigating officer and the defendant were never simultaneously present at the accident site, and therefore there was nothing to record. The fact that Subsection (A) was not applicable then allowed the Court to consider the exceptions in Subsection (B). However, again, in this case, Subsection (A) is applicable because, without dispute, video recording was practicable and began as soon as the arresting officer arrived. I therefore conclude that Manning is not helpful to the State's argument concerning compliance with Subsection (A) or the ability to utilize exceptions as set forth in Subsection (B) of the statute.

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10. Based on the above, and based on the findings of fact and conclusions of law in my previous order is this matter, I conclude that the Section 56-5-2953(B) exceptions are not applicable in this matter, and that there is no evidence to support an argument that they would or should be. I further conclude that the video recording did not comply with the requirement of Section 56-5-2953 (A) that the Defendant be shown receiving his Miranda rights on the video recording that was made. I therefore conclude that the appropriate remedy, as previously set forth in my June 7, 2016 verbal order and my July 25, 2016 written order, is dismissal of the case. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (S.C. 2011); The Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011); State v. Johnson, 396 S.C. 182,720 S.E.2d 516 (S.C. 2012).

IT IS SO ORDERED!

Donald B. Hocker
Judge, 8th Judicial Circuit

10-20, 2016
Laurens, SC

Laubshire Kinard case/Order1

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State of South Carolina)
) Court of General Sessions
County of Newberry)

2016-GS-36-0107

State of South Carolina)
vs.) Transcript of Record
)
Tony Latrell Kinard)
)
Defendant)

June 8, 2016
Newberry, South Carolina

B E F O R E:

Honorable Donald B. Hocker, Judge

A P P E A R A N C E S:

Dale Scott, Deputy Solicitor
Taylor Daniel, Assistant Solicitor
Attorney for the State

Michael Laubshire, Esq.
Richard J. Dolce, Esq.
Attorney for the Defendant

Joy E. Holston
Official Court Reporter

INDEX OF WITNESSES

(IC) - Denotes In Camera
(DW) - Denotes Defense Witness
(SW) - Denotes State's Witness

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(Whereupon, jury voir dire was conducted and the jury was impaneled at approximately 10:05 a.m.)

THE COURT: Mr. Laubshire, I understand you have some pretrial matters, the Solicitor informed me yesterday that you had some, is that correct?

MR. LAUBSHIRE: I do, Your Honor.

THE COURT: About how long do you anticipate the pretrial matters to take?

MR. LAUBSHIRE: Judge, I think this particular matter is pretty extensive, actually, may even require you to watch the videotape to make a determination factually about what happened at the scene, whether the requirements set forth in the State statute for a DUI videotape. So it may take a little bit of time to get through the motion. I would anticipate maybe, depending on what their arguments are, could be about two hours or so.

THE COURT: Okay. Is it just one matter, but of course will take a couple of hours possibly?

MR. LAUBSHIRE: It is quite possible, Your Honor.

THE COURT: Okay. Well, I don't want to leave the jury sitting back there for a couple of hours. I think what I am going to do is probably excuse the jury until about 1:00 o'clock, give us ample time to deal with this particular issue and then still give us time to grab a bite to eat as well. That is what we will do, maybe about

1:15. Will Solicitor Scott be back then?

MR. DANIEL: He should. I tell you, what is the motion again, it is under 2953?

MR. LAUBSHIRE: It is.

MR. DANIEL: Is that the only one?

MR. LAUBSHIRE: At this point, for right now, that is the only motion.

MR. DANIEL: And, again, Your Honor, this trooper was responding to a traffic accident investigation. It is almost inapplicable, that statute at this point. So I feel like we could probably handle it very quickly but he says he has got to argue it, I understand.

THE COURT: Well, let's do this. Give me, let's get a little flavor of where you are coming from and see if I can expedite it or if it is going to take extensive argument in viewing the, viewing of the video. Let's go ahead and before we decide to excuse the jury for any length of time let's go ahead and, let me hear from you and see what we have got.

MR. LAUBSHIRE: Judge, if I may approach, I have some copies.

THE COURT: You sure can.

MR. LAUBSHIRE: Judge, just by way of background, I know the Court is aware of the statute. Videotape requirement for DUI cases, 56-5-2953. What is required is

that the videotape include the field sobriety test, it include the person on the videotape showing him being advised of their Miranda rights. And also show the person being arrested. This case, Mr. Daniel was actually correct, this is a wreck case but the videotape statute, if you go further down, talks about what if he becomes applicable. If he comes applicable at a wreck case as soon as practical. Well, in this particular case the deputy was already there on the scene, the trooper comes up behind the deputy, his camera is already rolling, the camera is on, we have a full capture from the arresting officer's car from the moment he arrives on the scene. This isn't a situation where there is, medical attention needed, someone is trapped, someone has something going on that the officer has to deal with. This is not the case at all. The officer drives up with his camera rolling, so there is no, as soon as practical analysis needs to be done. He was on the minute he got there, he was there. So the videotape that we have is the entire scene. Where the problem comes in in this case is that the person, my client never is asked to get out of the car. It doesn't appear on this video at all, I don't actually see him anywhere on the video. All you can see is flashing lights from the backside of the deputy's car. There is no videotape from the deputy's car. The deputy hasn't

produced us a videotape, the deputy hasn't produced us an affidavit saying I don't have a videotape and here is why. My car was equipped with one, the one I have is broken, I tried to record, didn't record. We don't have any information about the deputy's car or why he didn't give us a video. We do have a video from the trooper's car and that video is deficient by the statute because it doesn't include my client being advised of his Miranda rights and it does not include the arrest of my client. That is set forth in the statute and becomes applicable in a wreck case as soon as practical. The statute gave the highway patrol and the deputies a little bit of leeway on these wreck cases so they can get out there and handle circumstances, they can handle these things. But that didn't happen in this case, they didn't need that, he was already running the video when he got there. This is not a situation where that is an issue. Previously how to resolve this problem is we have my client, he had a car, ask him to get out of the car, read him Miranda, tell him he is under arrest, and place him back in the deputy's car. My client was never even asked to get out of the car. You do hear the Miranda but you don't see the Miranda, you do hear the arrest but you don't see any arrest. I did a pretty extensive search trying to find a case on point and to be honest with you, I couldn't find

anything with the Court of Appeals or the Supreme Court. But what I did find was a significant number of Circuit Court opinions in this State discussing this very issue where this happened over and over again. And I have provided the Court copies on those opinions from this Court sitting in an appellate capacity from Magistrate's Court where this matter came up time and time again dealing with a person who has been arrested and been read Miranda off camera. And the first one is Carl Sullivan versus South Carolina, it is in the 16th Circuit. And Judge Hayes looked at that matter and that is exactly the case. He discusses how the videotape that requires both components, both a video of the person and the audio, it has to be together, it can't be one or the other. And he discusses how that, the videotape requirement, it can't be one part of it and not the other one. It goes into the exact facts of this case where he is off camera and you can hear it but you can't see it. And that is significant because it doesn't meet the requirements of the statute.

THE COURT: So, we have got a situation where first on the scene is a deputy sheriff, is that correct?

MR. LAUBSHIRE: That is correct.

THE COURT: Okay. And there is no video there?

MR. LAUBSHIRE: There is no video at all.

THE COURT: That is not your complaint because I had

a case not too long ago and I think it was in Newberry County where the defense was complaining about the deputy first on scene not having a video before the trooper got there. But that is not an issue in this case, is that correct?

MR. LAUBSHIRE: It is an issue, Judge, but I want to deal with this one first.

THE COURT: That is going to be an issue?

MR. LAUBSHIRE: It is an issue for sure.

THE COURT: And then the complaint, your first complaint then is concerning the trooper's video you hear but you do not see Miranda being given and the arrest. Correct?

MR. LAUBSHIRE: That's correct. And, Your Honor, I kept looking for more and more cases to see if this was just an anomaly of one particular Circuit or one particular Judge and that wasn't the case. I found it again in the 3rd Circuit with another Judge with the same kind of fact pattern, it was Judge Cothran, same scenario, you hear it but not see it. There is one from the 13th Circuit, the same set of facts, you hear the Miranda but you can't see it. Also dismissed, that was Judge Verdin. There is another one up in, I guess, it is also a Judge Hayes case, it is very similar fact pattern where you don't see Miranda. So it is not necessarily just one

thing or one anomaly. I even found some Magistrates Courts that dealt with it very similar, I have presented those copies to the Court. This is not primary authority but I think it is important that these are courts all over the place, Berkeley County, Beaufort County, Clarendon County, Greenville County, all of these Circuit Courts dealing with this very same issue finding in favor of the defense and dismissing the case. The statute gives my client an absolute statutorily right to have these things videotaped. And the State didn't do it and they have all the opportunity to do it and they could have had him out of the car and go in front of their car. The scene looks pretty calm, if it was that big of an issue he could have just moved his car up next to the car if he wanted to and turn the camera and videotape my client inside the backseat. He had a lot of opportunities to do this, to get this videotape in compliance with this. And even at that we still don't have any kind of affidavit to try to excuse the non-compliance. So we have a non-compliance and then we don't even have any kind of, would have been pretty simple if they had some reason which I haven't heard any reason or see any reason anywhere in the facts of this case of why he wasn't asked to get out of the car, to be arrested and got his Miranda read to him. And I will get to the second issue--

THE COURT: What I want to do, Mr. Laubshire, is hear from the State on this first one and then we can go to the second. I am just reviewing the statute. All right, Solicitor Daniel, you want to respond to the first issue before we get to the second?

MR. DANIEL: And the first issue is just--

THE COURT: The first issue as I understand it, is that the defense seeks a dismissal because the trooper's video does not show, the audio is working but does not show the defendant being advised of Miranda and being put under arrest as required by the statute, 2953.

MR. DANIEL: Your Honor, the fact that the video does show Mr. Kinard being placed under arrest, he is actually, Jessie Snelgrove is the person on the scene, he responds to the accident initially. So as Deputy Snelgrove is waiting for Trooper Barnett to arrive, Mr. Kinard of course is on the scene and he is completely belligerent and profanity laced tirades, he is incoherent, and they are worried that he is going to start assaulting people. He is just overly aggressive, there is a gas station nearby so really he is acting in a disorderly manner. And in fact Deputy Snelgrove charged him with disorderly conduct for that very reason, he plead guilty in Magistrate Court to it. So he was not in a position to even comply with any field sobriety test because he was

such a danger to himself or others.

THE COURT: Well, field sobriety tests were not done and that is not an issue here because it wouldn't have been anything in the video. I think what the defense is complaining about is the arrest and Miranda. Now, you are saying it is on the video?

MR. DANIEL: Yes, sir. You can say that Deputy Snelgrove already arrested him essentially because he is in detention but then when Trooper Barnett shows up and is gathering evidence at the scene it is clear that Mr. Kinard is under the influence. And then so Trooper Barnett's vehicle is directly behind Deputy Snelgrove's vehicle. So you have got Mr. Kinard in the back of the Deputy's patrol car. You have Trooper Barnett's car filming all of this with his dash cam and eventually once Trooper Barnett makes the decision, Mr. Kinard, you can hear it in the video and see Trooper Barnett talking to Mr. Kinard in Deputy Snelgrove's patrol car. So that does show the arrest because he is already in handcuffs and it shows him being advised of his Miranda warnings and I have the timestamp noted. So it is actually shown in the video.

THE COURT: Okay. Defense says it is not shown, the State says that it is shown. Consequently I am going to have to see the video.

MR. DANIEL: Yes, sir.

THE COURT: I don't see no other way around it. We have a difference of opinion. Okay. How long is the video approximately?

MR. DANIEL: Your Honor, it is about 45 minutes but for evidentiary purposes, what is of value, I can isolate it to where, I made a note where the Miranda warnings are administered and the arrest is made. Because a lot of it is just the Trooper going around basically gathering information for his accident report because that is his primary concern. It is almost secondary that it is a DUI case because that is why he is going out to the scene because of an accident.

THE COURT: Before we do that let me hear on the other ground for the dismissal. The fact that the deputy did not have a video. And I have dealt with that issue here, I am trying to remember, just a second. Okay, Mr. Laubshire, I will be glad to hear from you on the second motion.

MR. LAUBSHIRE: Judge, the deputy arrives first on the scene and there has been no affidavit presented to us why he doesn't have a videotape or why other stuff is on the camera. The facts do relay that he was arrested by the deputy, he was placed in a car. He was then transported to the jail by the deputy. I am not sure how

to get around the videotape requirement by not having any video at the initial scene. And if they don't, why they don't have an affidavit to cure that defect. There is no conduct reported at the scene. My client has no conduct from either police car and neither of the officers, the highway patrol or the deputy, either one have submitted an affidavit to tell us why.

THE COURT: And the deputy arrested Mr. Kinard just on the disorderly conduct charge?

MR. DANIEL: Yes, sir. He was just placed in detention really for his own safety at that point. I am not sure when the actual decision was made to issue disorderly conduct ticket.

THE COURT: Anything further Mr. Laubshire on the second ground for your dismissal?

MR. LAUBSHIRE: In talking with my client, the, he is telling me he wasn't actually arrested by that officer for disorderly conduct, that he was actually at the jail when he was given the ticket for disorderly conduct for a totally separate matter related to him not being able to use the bathroom and urinate. That is his position, that is the way the public disorderly conduct unfolded. He is telling me he wasn't arrested, he wasn't told he was under arrest and placed in handcuffs and put in the car by a deputy.

THE COURT: So, I guess it might, some agreement that there was no arrest for whatever when he was placed in the car. They claim it was because of his conduct, put him kind of detention type situation and your client says it wasn't any arrest at that point. Okay. Solicitor, you want to respond to the second point?

MR. DANIEL: Your Honor, I guess really the main case is directly on point for traffic accident investigations regardless of this disorderly issue.

THE COURT: What case is that?

MR. DANIEL: The Manning case is 400 SC 266. And that just talks about affidavits are not required in a traffic accident case. And even still we have in-car video, we produced it. As soon as the trooper arrived he has everything on there. If no field sobriety tests are administered then, of course, it is not like field sobriety tests were administered and they just weren't captioned on tape, none were administered because Mr. Kinard was so grossly intoxicated and belligerent.

MR. LAUBSHIRE: I don't have a copy of the case he is talking about.

THE COURT: Let me just pull it up and see what we have got.

MR. LAUBSHIRE: If my memory serves me correctly, what he is talking about is a videotape at an accident

scene where the defendant has already left the scene, the defendant is now at the hospital or on the way to the hospital. I don't know the name of the case but that sounds like the description. It would be nice if the Solicitor would give us copies of the cases.

THE COURT: You have got Mr. Dolce here that can probably pull it up for you.

MR. LAUBSHIRE: It is somewhat of a very different scenario. My client is, he is there at the scene and they are running the video, in that case they didn't even run the videotape.

THE COURT: Okay. We are off the record and I'm going to take a look.

(Whereupon, a break was taken.)

THE COURT: All right. Let's go back on the record. Concerning this affidavit portion of the argument, it's contemplated by the statute that the affidavit is from the arresting officer, the DUI arresting officer, because anyone charged with driving under the influence or driving with an unlawful concentration of alcohol in felony DUI and if an affidavit is required, it would be an affidavit from the arresting officer, the Highway Patrolman. So I don't think in this case, the affidavit portion of your argument really would help you any, because I don't think, I don't think the deputy who is there, he is not the

arresting officer for the DUI. Consequently, he would not be required to submit an affidavit. I still have to get over the hurdle of whether or not the deputy should have had a video videotaping the, at the incident site. I still have to deal with that, get over that hurdle. And, again, I've dealt with this. Why doesn't Newberry County have videos in their cars. And I've had one lawyer argue that they've had full opportunity to have videos, but they elected not to. So, but anyways. All right. Here's what I'm going to do. I'm going to go ahead and bring the jury out and excuse them until about 1:15 to give me a chance to take a look at the video and study on this a little bit more, receive any more arguments that either side has. And then we'll try to come up with something on that, so I'm going to bring the jury out and excuse them.

MR. DOLCE: Your Honor, before you do that, may I put one little thing on the record. When we spoke Monday concerning the scheduling of this case, I mentioned that I had a possible, a family obligation about 3:00 o'clock this afternoon. I'm not chief counsel on the case. If the case needs to go, I'll call my wife and tell her I'm sorry, I would like to be able to, you asked me to bring that up to you today.

THE COURT: Sure.

MR. DOLCE: So I'd just like to put that in front of

the Court.

THE COURT: If the case, you want to be here if anything, any activity is going on in the case.

MR. DOLCE: Yes, sir.

THE COURT: Okay. All right.

MR. DOLCE: I just need to make that decision--

THE COURT: Well, I mean, if you got, I don't want to, if you got something important that is family-related, I don't want to keep you from that. When would you need to leave here?

MR. DOLCE: 3:30.

THE COURT: Oh, leave here at 3:30?

MR. DOLCE: Yes, sir.

THE COURT: I thought you said it was a 3:00 that you had it.

MR. DOLCE: Well, I was planning on leaving so I could get there and get back to my house which is an hour away. So I can tell her I'll be a half hour late and 3:30 will be fine.

THE COURT: If my decision on this motion to dismiss is not in the defense favor, we will plan on going ahead and breaking early this afternoon around 3:30 so you can get home. Okay?

MR. DOLCE: Okay. Thank you very much.

THE COURT: All right. Let me get the jury out and

go ahead and cut them loose, all right? Madam Bailiff.

(Whereupon, the jury came into open court at approximately 10:52 a.m.)

THE COURT: All right. Let the record reflect that the jury is back in. Ladies and gentlemen, what we're going to do, I've got some pretrial matters that I've started dealing with the lawyers and it looks like it's going to take some more time and when I can, I try to avoid you spending a lot of time back in the jury room before you start your deliberations. Sometimes, it's the ones on the other case will attest that sometimes, I can't help it, you do stay there for extended periods of time, but I can help it in this case. So what we're going to do, we're going to break early for lunch as far as the jury goes, and I want you back here at 1:15. So and, as I've said before, if you intend to be out in public, say go to a restaurant for lunch or whatever, make sure that sticker stays on so anybody that's connected with the case who's at that same restaurant will be able to identify you and be careful of not talking about the case that at least is within your earshot. So be sure to wear that if you're out in public. Don't discuss anything about this case with anybody you come into contact with and we'll see you back at 1:15. Have a good lunch.

(Whereupon, the jury was excused from open court for

a lunch break.)

THE COURT: Okay. What I want to do, Solicitor, let's just take about a 10-minute break. You get the video up to where it needs to be and make sure that Mr. Laubshire and Mr. Dolce are in agreement, yeah, this is what I need to see and try to make a determination about what is or what is not shown on it. So we'll take about a 10-minute break, and let me know when you've got it ready, okay?

MR. DANIEL: You Honor, you just want to see the relevant portions, because all of it's about a 45-minute video in totality.

THE COURT: Well, I think for my purposes of ruling on the motion, defense claims that there is no video of the Miranda being given and the arrest, just audio. You're saying that it is. So I think for purposes of ruling on the motion, I don't need to see the entire video, do I, Mr. Laubshire?

MR. LAUBSHIRE: I don't believe you do, Your Honor.

THE COURT: Okay. All right. So, but I just want to make sure everybody's in agreement that the portion I am going to see is the correct portion, okay?

MR. LAUBSHIRE: I have a couple of few other points I'd like to make, Your Honor.

THE COURT: Oh, yeah, go ahead and give it to me.

MR. LAUBSHIRE: I can wait until after break if it's all right with, Your Honor.

THE COURT: I can go ahead and hear you now. Go ahead.

MR. LAUBSHIRE: And the last part of his issue is the Mt. Pleasant issue that Your Honor was talking about, that the videotape doesn't exist from the deputy. I've got copies of all those cases I'd like to present to Your Honor, as well.

THE COURT: Sure.

MR. LAUBSHIRE: I've already given to the Solicitor. A significant issue, though, because videotaping is required in these cases and you've heard the County, for whatever reason, didn't take advantage of that and the videotapes would be available if the equipment is available from the State, all you have got to do is request it. They haven't produced anything saying, requesting, what records they had to show, why they didn't get the equipment or install the equipment in their vehicles. Mt. Pleasant goes over that. Quite extensively would be a dismissal for their failure to produce these videos. And the most important part of this whole thing, in addition to that not being on there for Miranda and the arrest, is there is no conduct of my client at all. We don't have my client at all on that video. You never see

him on that video. He doesn't appear anywhere on any video that's ever been given in a DUI case, and then you have officers with essentially two opportunities to make that happen, but they never did.

THE COURT: Okay.

MR. LAUBSHIRE: No conduct, no Miranda and no arrest.

THE COURT: If I make it on that particular point, if I were to rule that there was not a video requirement insofar as the deputy goes, would it not be proper to restrict the State from bringing out any testimony from the deputy concerning any alleged conduct by the defendant, because you don't have the benefit of the video.

MR. LAUBSHIRE: Absolutely, Your Honor. In the alternative, I didn't ask for that to begin with, but absolutely and depending on Your Honor's ruling, we would be asking to suppress anything. First, my request is a dismissal or secondary, in the alternative, we're asking for those matters to all be suppressed, although I don't think that would be the best remedy in this case considering the State's statute.

MR. SCOTT: And, Judge, may I respond?

THE COURT: You sure can.

MR. SCOTT: I'm kind of late in the game, but I don't want to lose sight of the forest for the trees. This is a

traffic accident they responded to. There is absolutely no requirement to videotape traffic accidents. The initial arrest was public disorderly conduct. There is no requirements to videotape an arrest for public disorderly conduct. There's no requirements to videotape his conduct during a public disorderly conduct-type arrest.

THE COURT: Right.

MR. SCOTT: And it'll become crystal clear, but Snelgrove is responding to a fender-bender on the side of the road. Has no idea how drunk this man is. When he gets there, he's acting wild, he's acting crazy. In order to subdue him and prevent any further, you know for his own safety or for the officer's safety, puts him in the car and goes ahead and makes the decision to arrest him for public disorderly conduct. No videotape requirements have been triggered at this point. At some point, Trooper Barnett, and I make no excuse for Newberry's lack of videotape or cameras in their sheriff deputies cars, but it's not applicable in this situation, if it's not a DUI arrest by Snelgrove. Barnett gets on the scene and begins talking with Kinard after it becomes suspicious, maybe smelling this alcohol, and it's only at that time that they make the decision to arrest him. There's no field sobriety, there's no other conduct per statute that's supposed to be required that we're missing here, simply

because there was no field sobriety. All of the conduct you're going to care to see from this man is going to be produced by the State. It's just simply we get bogged down in that statute. But when you look at it, it's a, they are responding to a traffic accident. He's arrested for public disorderly conduct. None of those requirements of the videotape and a trigger to that point. And, again, I think Taylor cited it, I think the statute, 56-5-2953, subsection B, wherein it states, in circumstances including traffic accidents, investigations, the video recordings required by this section or the failure to produce video recordings required by this section is not alone a ground for dismissal. And then the Manning case is on point as well. So I think when we step back, I understand the provisions. I understand how technical this law has gotten at this point, but they're not triggered in this current situation.

THE COURT: I understand. Okay. Well, let's take about a 10-minute break and get the video.

MR. LAUBSHIRE: Judge, may I just respond to that?

THE COURT: Sure.

MR. LAUBSHIRE: Very briefly. The Solicitor cites Manning as their case on point. That's comparing baseball to football. That case, the differences are startling. An officer shows up and the guy is gone. The guy is not

even on the scene. There's nothing they can videotape. There is nothing to videotape. My understanding also is that he's the first officer on the scene, as well. In this case, my client is still on the scene. He is still there. The videotape requirement does go into effect and the statute says in a wreck, as soon as practical. Well, in this case, as soon as practical was immediately, because he drove up with the videotape. I think the statute, it's intention, was to give the officer a little bit of leeway in case an emergency or exigent circumstances or something like that. They didn't have that, because they have the videotape. They actually ran film on this guy. They just didn't comply with the statute. I don't think they are trying and sidestep saying, well, because we messed up, Judge, don't pay attention to that. That doesn't really matter. We weren't supposed to do that anyway. That's not true. That's not even close to true. The statute requires the videotape. It gives them that little bit of extra, but in this case, that little bit of extra is not necessary. They ran the video. They have the video. They had complete control of my client. He's in handcuffs in the back of a patrol car. They got him to jail. They got him in the handcuffs and they have complete control. If they wanted to comply with the statute, they could have. They

could have put him in front of the camera or put the camera in front of him. They had two opportunities to get this job done. They just didn't do it. It's required. The State created liberty interest in the statute and it just didn't happen.

THE COURT: Thank you very much. Okay. We'll be in recess about 10 minutes. Just let me know when the video is ready.

(Whereupon, a short break was taken.)

MR. DANIEL: Joy, can we mark this as Court's Exhibit. That's the in-car video the Judge wants to watch in a second.

(Whereupon, Court's Exhibit 1 was marked for identification only.)

(Whereupon, a video was published to the Court.)

THE COURT: Okay. We're on the record and what we're doing, this is all in-camera. I've just viewed a very small portion of the video at the scene concerning the trooper's advisement of Miranda, also placing the defendant under arrest. To offer an explanation of what I just observed on the video and I want to take some testimony in-camera from Trooper Barnett. Madam Clerk, would you swear Trooper Barnett, please?

MICKEY BARNETT, being first duly sworn, testified as follows:

EXAMINATION BY THE COURT

BY THE COURT:

Q Trooper Barnett, would you explain to us what I just saw on the video?

A Your Honor, this right here is the westbound off-ramp for Exit 74. This is heading towards Greenville. When I pull up on-scene, a Chevy pickup is in front of the deputy's car. It's got rear-end damage to it. It's still in the roadway. Off to the right here is Mr. Kinard's Mazda. It has heavy front end damage and it appeared the vehicle had been removed from the roadway. So the only lane of traffic I have is right here behind Deputy Snelgrove's car, so that cars can still get on and get to the off-ramp. As I do the investigation of the wreck scene, I'm advised that Mr. Kinard is in the back of the car for reasons that Deputy Snelgrove can later testify to. 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.

THE COURT: Okay. All right. Okay. Solicitor Daniel, any questions on this limited issue from Trooper

Barnett.

CROSS-EXAMINATION

BY MR. DANIEL:

Q All right. Trooper, so Tony Kinard is in custody or in detention in the backseat of Deputy Snelgrove's patrol car?

A Yes, sir.

Q Okay. So that's what we're looking at on your video?

A Yes, sir. Deputy Snelgrove's car.

Q Okay. So Mr. Kinard is in the backseat. And where are you standing?

A When I go to talk to him, I come on the passenger side, because that's the side Mr. Kinard was on. He was in the rear passenger's side. I opened up the door. When you see the door, I'm in the apex of the door. The reflective vest of Deputy Snelgrove is standing off to my right to stand there just in case anything, he needs to respond for anything.

THE COURT: Okay. Defense, any questions on this one limited issue?

MR. LAUBSHIRE: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. LAUBSHIRE:

Q Trooper, did you ask my client to get out of the car at any point?

A Based on demeanor; no, sir.
Q Did you ask this deputy to turn his lights off?
A No, sir. Because at the time, I wasn't doing a DUI investigation. So I didn't have the blue lights turned off, because we weren't doing field sobriety at that time.
Q When you go to the apex of that door, isn't it true that you arrested him for DUI?
A Then, yes sir.
Q Is there any reason why you didn't have the deputy turn his lights off?
A Because there is no field sobriety being done, sir. Field sobriety comes into play, the lights come into play when we do field sobriety, so it's not reflecting in their face.
Q And what about the arresting Miranda, so we can catch that on video?
A You did, sir. You saw me standing in the apex of the door and I gave it to him on video. And I explained that based on his demeanor with the thousand-yard stare, I wasn't going to get him out the car with that.
Q I saw the reflective vest only. Where exactly were you?
A The reflective vest, I was in the apex of the door. I didn't have my reflective vest on, because we were on the off-ramp and I had just gotten out for the accident

investigation. I hadn't put my reflective vest on.
Q Did my client do anything aggressive toward you at all?
A At this point; no, sir. But later he did; yes, sir.
Q But at this point right now, not down the road, I'm talking about right here, right now. Did he do anything, did he make any moves to be aggressive towards you directly?
A 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.
Q Well, nothing else happened. He made no actual moves towards you or anything like that?
A He refused to speak to me.
Q And he was in handcuffs?
A Yes, sir.
Q Was he under control?
A He was under detention; yes, sir.
MR. LAUBSHIRE: No further questions of the witness, Your Honor.
THE COURT: All right.

EXAMINATION BY THE COURT

BY THE COURT:
Q There was a person that I saw standing at the door.

Presumably that was you, correct?
A Yes, sir. That's me.
Q Okay. All right. Had you had a, leading up to that, had you had any conversations with the deputy concerning why the defendant was in the car?
A Yes, sir.
Q Okay.
A Prior to this, Deputy Snelgrove had told me what had occurred when he arrived on the scene and that's why he was in there.
THE COURT: Okay. All right. All right. Let's take some in-camera testimony, Solicitor Daniel, from the deputy as far as what all he observed prior to the trooper coming on-scene.
MR. DANIEL: Yes, sir. Deputy Jesse Snelgrove, Your Honor.

JESSE SNELGROVE, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DANIEL:
Q All right. Deputy Snelgrove, you're employed with the Newberry Sheriff's Office?
A Yes, sir.
Q And were you on duty the evening or night of November 3rd, 2015?

A Yes, sir.
Q Were you dispatched out to I-26 around the exit 74 westbound ramp where Highway 34 intersects with the Interstate?
A Yes, sir.
Q And what was that call; why were you dispatched out to that location?
A I was called out there for a wreck, just to assist Highway with a wreck.
Q Okay. What type of wreck, multiple vehicles involved?
A At that time, they didn't tell me, but all they had told us at that time was a wreck.
Q But the Highway Patrol has the mandate to investigate traffic accidents, correct?
A Yes, and we just go just to assist with keeping traffic moving and stuff like that.
Q Okay. So approximately what time do you arrive at this wreck scene?
A I get on-scene at 18:46 which is 6:46 in the evening.
Q At 6:46 p.m. you arrived?
A Yes, sir.
Q Okay. It's dark out?
A Yes, sir.
Q All right. And what do you observe when you arrived

on scene?

A When I first pull up, I can see a black male with the EMS, and I could see he's throwing his hands up in the air. And I can't hear him in my car at this point, but I can see he's making, his mouth looks like he's shouting. So when I get out, I can hear him shouting. He's shouting at the EMS. He's got his hands all over the place, and he's also shouting at a black female. Later on during the time, I found out that's his girlfriend or wife. I'm not exactly sure at this point.

Q Okay. Who was identified as this black male?

A The defendant, Mr. Kinard.

Q Okay. So EMS had been on, EMS was on the scene before you?

A Yes, sir.

Q And a black female--

A Yes, sir.

Q --was on the scene?

A Yes, sir.

Q Was the Fire Department on the scene?

A Yes, sir.

Q Would that be Daniel Werts of the Friendly Fire Department?

A Yes, sir.

Q Okay. So they were all on-scene prior to your

arrival?
A Right.
Q All right. So Mr. Kinard is throwing his hands up in front of EMS while they're trying to check him out?
A While they're trying to check him out; yes, sir.
Q All right. What's he saying and things like that, demeanor?
A He's just mainly shouting at them, screaming, using profanity. And at this point, I walk up to him to try to calm everything down. He's still shouting. When I get up there, he squares off at me to start with. I'm trying to get him to calm down. But he's still, he's cursing and, excuse my language on this, but--
Q No, tell us exactly what he said.
A First he starts yelling, fuck you. Excuse me, fuck you, motherfucker. What the fuck are you going to do. And while he's shouting, that's when I can smell alcohol on his breath to start with. I tried to calm him down a little bit and after a few minutes talking to him, he squares off at me a second time and balls up his fist and he's got this like thousand-yard stare going on. The second time he yells and curses he says, fuck you. I'm the motherfucking God. Fuck you, son of a bitch. And he has this like God complex. And at this point, he's still throwing his hands around. I go ahead and for his safety

and everybody else's, I go ahead and put him in handcuffs and tell him at that point he's under arrest for disorderly conduct. And then he's placed in my car.

Q Did you feel threatened at that point?

A Yes. The way he was, his demeanor and his actions, yes.

Q Did you feel like you were going to be assaulted by Mr. Kinard?

A With the thousand-yard stare, yeah.

Q Okay. And what was your understanding in terms of the collision; what did you observe in that respect?

A When I first arrived on the scene, there was a truck ahead of my car and there was a car to my right, which was the Mazda. And that's where, Mr. Kinard was outside of his car and beside the Mazda and that's where EMS was checking him out along with the black female. And that's when I interacted with him the first time.

Q Okay. And at that point, was it a DUI investigation?

A I don't do DUI's. That's all on Highway. I'm just there to assist.

Q And it's your understanding Highway Patrol is in route?

A Yes, sir. Well, I was advised they were coming.

Q Okay. How soon did Highway Patrol arrive after you got there?

A It wasn't long. Maybe 10 minutes at the max.
Q All right. And did you receive any other information that was pertinent to this case from any witnesses on-scene?
A I was advised by Mr. Werts that the black female that was with Mr. Kinard had taken stuff out the car. He told me she'd taken out some alcohol and some bottles. I relayed that to Trooper Barnett. And I actually asked the black female at that time if she'd taken anything out and she'd told me no, that she hadn't taken out anything but the baby seat and some papers. I told Trooper Barnett when he arrived on the scene and she did turn over and advise that she did take some alcohol bottles out of the car.
Q Okay. So you relayed all that information to Trooper Barnett for the purposes of his DUI investigation?
A Yes, sir.
Q So open containers were discovered--
A Yes.
Q --in the vehicle Mr. Kinard had been driving?
A Not at the point I was there. They had been taken out by the female and they were, the Crown Royal bottle, I believe it is, was inside her car. And the beer bottle she advised throwed on the side of the road, but all of those were collected for Trooper Barnett.

Q Is your patrol car equipped with dash cam or in-car video?
A No, sir.
Q Okay. Is your car equipped with that now?
A No, sir.
Q And what's the reason why the Sheriff's Office or you, in particular, do not have that recording system?
A Honestly, I don't know. I guess, they're trying to get the funding for it.
Q So it's your understanding it's just lack of funding?
A Yes, sir.

MR. DANIEL: I beg the Court's indulgence. Please answer any questions Mr. Laubshire has for you.

THE COURT: Mr. Laubshire.

CROSS-EXAMINATION

BY MR. LAUBSHIRE:

Q Deputy, my client was just in a wreck, wasn't he?
A I'm sorry, what?
Q My client was just in a wreck, wasn't he?
A Yes, sir.
Q So understandably upset?
A Yes, sir.
Q Now, you said he had squared off at you?
A Yes, sir.
Q What do you mean?

A He kind of got in like this fighting stance with one leg staggered from the other, fists balled up.
Q Did you notice that he had a boot on his foot because he just had surgery done?
A He advised me of that when he got in my car.
Q Did you see it?
A Yeah.
Q So his stance may have had something to do with that, right?
A It could have.
Q Trying to keep the pressure off that foot? Now, did he make any aggressive moves toward you? Did he try to sort of punch at or kick at you or anything like that?
A No. At that point, no. Like I say, he just squared off, balled his fist, but he kind of had a slight little rock to him. But that could have been something else.
Q When you put him in handcuffs, how did that scenario go?
A He tried to resist a little. I wouldn't really classify it enough to charge him with resisting arrest, but he did try to keep me from putting him in cuffs.
Q But you didn't charge him with resisting arrest?
A No, sir.
Q And you didn't charge him with assault and battery?
A No, sir.

Q Or any kind of assault or battery on a law enforcement officer or anything like that?
A No, sir.
Q No interference with law enforcement; nothing?
A No, sir.
Q And you testified on direct from the Solicitor that you don't have a camera in your car?
A Right.
Q And you don't know why you don't have a camera?
A Right.
Q And you've never been told why and you have no records to show any requests for videotaping equipment or anything like that?
A No.
Q No requisition forms, no documents, letters from you?
A No, sir.
Q Have you ever asked anyone on your command staff as to why you don't have a camera?
A The last I was told is it's trying to get the money for it, so I haven't asked recently.
Q And today you didn't bring any records with you to show the Court as to why you don't have a camera?
A No, sir.
Q I just want to be real clear. My client didn't actually make an aggressive action towards you to actually

strike you?

A No, sir. Just a stance with balls up, his hands balled up.

MR. LAUBSHIRE: One second, Your Honor.

THE COURT: Sure, take your time.

MR. LAUBSHIRE: I have no other questions of this witness, Your Honor.

THE COURT: Okay. Solicitor, anything in follow up?

MR. DANIEL: No, sir, Your Honor. Nothing in follow up.

THE COURT: Okay.

EXAMINATION BY THE COURT

BY THE COURT::

Q Deputy Snelgrove, did you relay all this information to Trooper Barnett when he arrived on the scene?

A Yes, sir.

THE COURT: Okay. Thank you very much. You can step down. All right. Let me hear the position of both sides concerning the defendant not being shown on the video when Miranda was given and the arrest. Solicitor.

MR. DANIEL: Your Honor, clearly due to officer's safety, I mean, Mr. Kinard's menacing and he's standing in a very threatening posture. They are, keep in mind, they're right off I-26. You got cars whizzing up the exit ramp at high rates of speed. And it was impractical to

pull Mr. Kinard out of the car just for purposes to put him on the in-car camera system. And, again, the trump card in all of this is this is a traffic accident investigation. But not withstanding that, Trooper Barnett still does produce a video which I submit is in compliance nonetheless with the statute because Miranda warnings are captured on the audio. They couldn't take Mr. Kinard out because of his demeanor and what he had been doing prior to the Trooper's arrival. In fact, I think that's exposing the officers to a lot of liability to pull Mr. Kinard back out of that car just so they can see him on camera being advised of his Miranda rights. The main purpose of Miranda is that you hear it, not see it.

THE COURT: Okay. You know, we've had several recent cases concerning video, complete videos of field sobriety tests being, some litigation as far as not showing completely the defendant, 2953 impose that kind of same requirement, at least as our Appellate Courts have argued concerning field sobriety tests that the Miranda arrests, that the defendant be seen on the video as well?

MR. DANIEL: Your Honor, I think in those cases it's all where someone actually does submit to field sobriety tests. Here, Mr. Kinard is non-responsive to the officer. So, again, it's only if field sobriety is, in fact, administered. And if it's not administered, of course, it

can't be captured.

THE COURT: Maybe you didn't understand my question. The Appellate Courts pretty much said that there needs to be a complete video of the field sobriety test. I think the first case that came out where the eye gaze test was done and the defendant's face was not shown or something to that effect. And the Appellate Court said that that was not proper. My question is, assume that we have a requirement that field sobriety tests tend to be shown completely. Does that same requirement spill over into when Miranda and the arrest is done? That's my question.

MR. DANIEL: Your Honor, I think actually, I can't pinpoint it now, but there's one case where Miranda, or someone is captured on videotape while Miranda is being administered but yet, due to a defect in the video and there's audio. And they said, well, since it's, there's no audio, Miranda, you can't comply without it. But here, we have audio, just not picture.

THE COURT: Right.

MR. DANIEL: So the main purpose, I think, is to have audio, which we do. And, again, it's a traffic accident investigation.

THE COURT: So I guess that your answer is no, the same requirement doesn't apply?

MR. DANIEL: Right. Yes, sir. Sorry for being long

winded.

THE COURT: That's okay. That's all right. Mr. Laubshire.

MR. LAUBSHIRE: Judge, we have quite the opposite position. We don't have a statute that requires these things beyond video for murder. We have it for DUI. So they must have really intended that this be a complete video. And they also gave us a very, very serious sanction for not doing it. For not doing it. They put it in the statute it's dismissed. And the courts have followed that as Your Honor mentioned. And this case is a wreck, but the videotaping requirement does apply, because the practicable part in the statute shows that the video was running. So as soon as the video starts, they've lost complying with the statute. They can't just say, well, I know we can grab this video and it works. So we just push them aside. Not true. They ran the video. Once the video is on, it must comply with the standards set forth for the statute. And all those requirements for the field sobriety tests, Miranda and the arrest must be completely on videos. And, in addition, their explanation as to why they didn't do it, the guy had a boot on his foot. He'd just had surgery. He hasn't been charged with assault and battery. He hasn't been charged with resisting arrest. He hasn't been charged with any of these things and no

charge related to anything violent towards the officers. He made no aggressive motions toward the trooper. There is no reason why they couldn't have just asked for him to get out of the car and have him come over. He's under control. They could have turned the lights off. That could have even changed the scenario. They could have moved the trooper's car. That could have changed the scenario. There's so many options available to these guys to have done this correctly. Just to come off and say, well, you know, he did cuss a good bit. He cussed at us and, you know, he did ball up his fists and he stood kind of aggressively. He's got a boot on his foot where he had surgery. He's trying to keep the weight off that foot. If Your Honor would like to see the surgery scar, we can show Your Honor where he had surgery. So he certainly can't fight anybody with a boot on his foot where he just had surgery. Also, they never asked him for a sobriety tests. He was never asked. He was never, ever even given the opportunity. It is required and if you look back at the previous statute, I think this is the most telling. The previous statute only required conduct. They have revamped the statute and added these three very specific areas to the statute. The sobriety tests, Miranda and the arrest. They didn't add anything else. They specifically added those things when they remanded the statute. I

think it was February 2011 when they redid the statute and took out some of the other requirements but added those requirements specifically for the videotaping.

THE COURT: Thank you very much. Anything in response?

MR. SCOTT: Your Honor, it says show, must show Miranda. There's plain reading of that. We watched Miranda being administered. I think as Solicitor Daniel stated, I think the idea of Miranda is to hear Miranda being administered, those magic words being administered to the defendant so he understands his rights. It's just impracticable in this situation that you've got a belligerent defendant, to pull him out of the car and put him on the side of the road after he's already made threatening gestures just to have him stand there. I think, obviously there's horizontal nystagmus that if you need to make sure their eye, their head is standing still or standing still instead of moving back and forth. So you want to display that. What benefit would you get from having this man stand there as the trooper is administering, it's just commonsense test. I know of no case that says that you need to visibly see the defendant as he is taking in these rights, and I know of no case like that.

MR. LAUBSHIRE: I would like for the Court to, what

show means, specifically what show means. Show means on a video, something we can hear and see. What would be the point of having a statute if you could just dispose of it at will like they're suggesting that the Court do. Just say forget about it. What message are we giving to you? What are we really doing? I'll tell you what we get, Judge. We get compliance with the legislatively mandated requirement of the statute 56-5-2953. They didn't ask me, all came around to my office and say hey, what do you think we should do with this? They made this statute on their own and they expected us to follow it. And they gave a very serious action for doing it. And show does mean, you have a trooper had to show us where he was in the video. You can't see him and he's eclipsed by a vest worn by the deputy. So you can't see because of those blue lights and the position of the camera.

THE COURT: Well, now, I take a little exception, because I could tell that was the trooper. I mean, I asked him to make sure, but I can tell that was the trooper. I can see the, him, his body as he's standing at the side of the car talking to the defendant. I mean, I could see him. Thank you very much. I'll take this under advisement and we'll take a little longer lunch break than normal.

MR. LAUBSHIRE: May I add one thing?

THE COURT: Sure.

MR. LAUBSHIRE: The Solicitor says my client's being belligerent. You saw the video, the section. Your Honor heard everything that happened. My client didn't cuss the trooper. He didn't refuse to comply with the trooper. He didn't do anything. He exercised his right to remain silent, but he didn't refuse to give anything that he wasn't legally allowed to do. So when he says belligerent, I didn't hear or see anything my client did that would excuse the non-compliance.

THE COURT: I think what and I certainly don't have to speak for Solicitor Scott, but I think he was referring to what took place, allegedly took place, after Deputy Snelgrove got there. Okay. I'll take a look at this and we'll get back together around 1:15.

MR. DANIEL: Your Honor, it's my understanding, Mr. Laubshire may make a motion under 2953 to have this case dismissed due to the breath test site video. I would ask the Court maybe to review that, as well, because I think maybe he might move to make that motion once the trial has begun, the jury has been sworn. I'd like for that motion to be decided pretrial for jeopardy purposes.

THE COURT: We do not have a video at the breath site.

MR. DANIEL: Yeah. We do have a video. I just, he

may make a motion to say that video is non-compliant and it needs to be dismissed on that basis, because of what happens in the breath test site.

THE COURT: All right.

MR. LAUBSHIRE: Judge, if he'd like to put that motion up himself in limine, that's fine with me. If he doesn't want to wait for us to make it, he can make the motion himself.

MR. DANIEL: No, I'm saying that he's been given opportunity to make it pretrial, he'd be precluded from making that after the jury is sworn. I'd like for Mr. Laubshire to make the motion now.

MR. LAUBSHIRE: Judge, absolutely not. The State can't tell me when and how I can make motions in this case, and I am allowed to make motions at any time during this trial.

THE COURT: Right. Right. I mean, I agree and if it turns out that he attempts to make a motion that is not timely, then, you know, I could possibly deny it on that basis. But if he does, for whatever reason, he doesn't want to raise a particular issue at this time, I can't force him to do so.

MR. DANIEL: Yeah. Well, my concern, Judge, for jeopardy purposes and say you do dismiss it on the basis of a non-compliant video, in terms of the breath test

site, and it already occurs once the trial has begun, the State would lose any appellate rights at that point, because jeopardy will have attached. And that's why we do, it's in our prosecution handbook to have these motions heard pretrial under 2953.

MR. LAUBSHIRE: Judge, that almost sounds like the State, and I've never really had to deal with this in a General Sessions case. It almost seems like the Solicitor is asking the Court ahead of time to give an advisory opinion as to whether they have a case or not and if they do, let's go forward. But if we don't, let's go ahead and have an opportunity to appeal it instead of just going forward with the case. They have a case or they don't. If they have to come here to ask the Court whether we have a case or this case may get dismissed by motion, they need to have a conference to decide whether they have a case at all and they can dismiss it on their own.

MR. DANIEL: We have a very strong case, Your Honor.

MR. LAUBSHIRE: Well,--

MR. DANIEL: That's not why I'm making this motion.

THE COURT: In Jackson v. Denno, if we know there's going to be a suppression hearing, we always have that, you know, before the jury is sworn. If he thinks that's literally or legitimately going to be an issue, now would be the time to raise it.

MR. DANIEL: There are certain motions that are required to be before the jury is sworn. For example, issues with indictments. That's the black letter of law. If you've got an issue with the indictment, you must make it before the jury is sworn.

THE COURT: You know, and certainly it's not for me to concern myself with the State or the Defense, for that matter, ability or inability to appeal a ruling that the Court makes. But, I guess, just for my edification, Solicitor Daniel, why do you say that if we start the trial, if that is what we end up doing, and then at some point during the trial the Defense moves to dismiss the case based on whatever ground. Why are you, why would the, and if I rule in their favor and dismiss the case, why does that have some effect on your ability to appeal the issue?

MR. DANIEL: Jeopardy is attached at that point, Your Honor, because the jury has been sworn and that's why and in all DUI cases, and particularly this one, when this man has six prior DUI convictions and is rear-ending somebody on the interstate, I've got to cover my bases on this case.

THE COURT: Am I hearing you correctly that the State can never appeal the ruling once the jury is sworn?

MR. DANIEL: Essentially, Your Honor, it would be the

functional equivalent of a directed verdict and because if he makes the motion and grant it in his favor and the jury has been sworn, I don't think we could retry Mr. Kinard, because you got double jeopardy issues. Say if His Honor were to dismiss at pretrial at least we could, if the State elected to, and I'm not saying, it's just I have to kind of cover my bases on this case.

THE COURT: I understand. I understand. I just hadn't dealt with this.

MR. DANIEL: And it would slow down the trial, as well, Your Honor. If you could review it and that way the trial would be, we could streamline, as well, if you decided. That's really, that's another reason.

THE COURT: So, Mr. Laubshire, if I'm hearing you correctly, you're saying that the State attempted to seek some advisory opinion, formally move the Court to declare that the breath side video is in compliance with the statute. Is that what you're saying?

MR. LAUBSHIRE: That's correct, Your Honor. I believe that's what they're trying to do. They're trying to put all their evidence, and that's been okay, let's move on from there and subject to put that in only by you. This is a decision the Solicitor should have made prior to us being here and striking a jury today. If they have issues with these things, you should dismiss the case.

THE COURT: Well, now, I didn't quite follow what you just said.

MR. LAUBSHIRE: If they thought they had issues with this case for non-compliance, they should have waited to call the case until they had an ample opportunity to--

THE COURT: Well, I mean, again, Solicitor Daniel either, but I'm assuming that they feel like the breath site video is good. They anticipate you raising that issue that is not good. Okay? So it's not a situation where they feel like they got a bad video, that's a good video as they have argued that the incident video is a good video. They're just anticipating what a jury may raise once we start the trial of the case. Now, that's my perception of it.

MR. DANIEL: Yes, and it's just like any motion in limine where we want to kind of have the, I don't want it to be disruptive of the trial. If we could, you know, perhaps decide at the pretrial, and then he could just renew his objection once we play it. It's a lot faster that way. I think the idea is once we get rolling and we get ready to play the thing, if he objects right then, we're going to have to shut down court.

THE COURT: Well, and I don't have a, that's not going to factor in. We shut down court all the time. We make juries sit back in the jury room for lengthy periods

of time. So that in and of itself is not going to factor into my ruling. I'm hearing that the State's rights are going to be prejudiced in some manner if I don't force the Defense to make their motion now and take a look at this breath site video. That's what I'm hearing.

MR. DANIEL: Well, I hate to not have a unified front. I'm not so much concerned with that and I've seen the video and I'm confident it complies. My point is this, why not do it now? We covered that motion just now. I mean, when we get ready to show it, when he brings up the objection then, judicial economy for one thing, let's go ahead and do it now so we can roll with it, because we're certainly going to present it.

MR. DOLCE: There's five witnesses, Your Honor, listed, so why don't we just go ahead and do all of them, to find out what the State's objection is. Now, this, he's trying to get, we don't even know if they're going to introduce that video. When they produce the video, they can live with it or die with it.

THE COURT: All right. All right.

MR. LAUBSHIRE: If I could, Your Honor, what they're trying to do is I don't control the Solicitor's side of the table. They're trying to control our side of the table and tell us what we can do and what we can't do.

THE COURT: All right. Let's assume that Solicitor

Scott's opinion trumps Solicitor Daniel's opinion on this and with that assumption, again, I'm not going to force the Defense to make any motions for the sake of judicial economy. If we have to shut down for a period of time in order to deal with the issue, then I'm going to deal with it at that time. So I'm not going to require them to, in light of Solicitor's Scott's opinion that he doesn't believe that there would be any prejudice to the State.

MR. DANIEL: And nor do I, Your Honor. I think it's a solid video.

THE COURT: Okay.

MR. DANIEL: And we are actually on the same page now.

THE COURT: I understand. I understand. And even though it's probably certainly more practical maybe, a little bit more common to deal with these issues pretrial, but the Defense doesn't want to raise it at this point, then I'm not going to raise it--

MR. DANIEL: Yes, sir.

THE COURT: --or deal with it. Okay. All right. And thank you very much. We'll get back together here in just a little bit.

(Whereupon a lunch break was taken.)

MR. COURT: All right, gentlemen, I have, the period of time we have had over the lunch break looked at this

issue concerning the video. My ruling is going to be very narrow, I know the defense raised several grounds for his motion to dismiss. But if you will look at 56-5-4953, subsection (A), subsection (3I), it says that the videotape must show the person being advised of his Miranda rights. I don't know how much clearer that can be. Now the rest, you know, you could maybe argue either way possibly but concerning Miranda rights, I don't know how clear it can say, show the person being advised of his Miranda rights. The videotape clearly does not show the person. Why is that a requirement. Well, I am not exactly sure. I guess to verify that the person was right there being told of the Miranda rights, certainly not to suggest that this trooper or any other trooper would falsify that and not actually, you know, have the person right in front of them being, you know, advising them of Miranda. But it says, show the person being advised of his Miranda rights. And the video clearly does not show the defendant. That is the plain reading of the statute which I am required to do. Now, let's go down a step further and look at the subsection (b), exceptions. The way I read the entire subsection (b), and I am going to address the accident portion of the State's argument. But the way I read the entire subsection B exceptions is only in the situation where there is no video produced. I

don't equate a flawed video with no video. I don't equate those two. So exceptions the way I read subsection B, that only comes into play. You only are to consider that when there is no video. Okay. Now, I was even trying to figure out well, you know, it does have this kind of catch-all provision. Nothing in this section prohibits the Court from considering any other valid reason for the failure to produce the video. I don't think that applies in this situation because we have a video. I guess, it's almost better for the State not to produce a video and try to get out from under that under subsection B that have a video, in some respects. And the accident exception, the statute doesn't say well, if it's an accident investigation, you don't need a video. It doesn't say that. It says you start one whenever you can. Well, this trooper was able to start one at the very beginning. So the fact that it was an accident situation doesn't alter what we have. I find it real interesting and I don't know if the state was given these Circuit Court orders or not.

MR. LAUBSHIRE: They were, Your Honor.

THE COURT: Okay. And, of course, John Hayes has been on the bench for many years and greatly admired for his wisdom and he is a whole lot smarter than I am. And he has an identical situation where the Miranda warning person was not shown being given the Miranda warning. I

think there was the audio, if I remember correctly. But the defendant was not shown and he granted the defense motion to dismiss. I don't see how I can rule any other way other than to grant the motion to dismiss. But what I would like, of course, I'd need the defense to prepare the appropriate order and I strongly invite and encourage the State to file a Motion for Reconsideration to give the State and the Court and the Defense, for that matter, but you're the one that brought the motion, so you've probably been looking at this issue a whole lot longer than the State or the Court has, to give everybody an opportunity to research and investigate this further. But, you know, again, plain reading of the statute, show the person, show the person being advised. Our video doesn't. Subsection B exceptions, failure to produce a video, failure to produce a video. I don't think those subsection B exceptions apply in this case. So on this very narrow issue, I'm going to grant the Defendant's motion to dismiss this case. But I'm being very serious in encouraging the State to file a motion for reconsideration so we can look at this further and have more of an opportunity to look at it further, even though I'm not suggesting that you've got a strong case of changing my mind. I'm not suggesting that. I think my opinion about this is going to remain the same. However, you know,

researching it over an hour, hour and 15 minutes. And I'm not being critical or fussing at the Defense, but I always wonder why these types of motions are not provided to the Court before the day of trial and I think I've had this come up a lot. I just wish I would get these things a lot earlier than waiting on the morning of trial, and then, you know, we have to look at this. But anyways. So, Mr. Laubshire, if you and Mr. Dolce would prepare the appropriate order. And but I want it, I want it narrow on this one issue. I'm not getting into about the County not producing a video and the other arguments that were made. Okay. Anything further.

MR. DOLCE: Not from the Defense, Your Honor.

THE COURT: Okay. Anything further from the State?

MR. SCOTT: No, sir.

THE COURT: Okay. All right. Thank you very much. This matter is concluded.

*** END OF REQUESTED TRANSCRIPT OF RECORD ***

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Newberry)

I, Joy E. Holston, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the County of Newberry, South Carolina on the 6th day of June, 2016.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

September 5, 2016

Joy E. Holston, Court Reporter

My Commission expires: May 2, 2026

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF LAURENS)	
The State,)	
)	TRANSCRIPT OF RECORD
-vs-)	2016-GS-36-0107
)	
Tony Latrell Kinard,)	
)	July 25, 2016
Defendant.)	Laurens, South Carolina

B E F O R E:

HONORABLE DONALD B. HOCKER, JUDGE

A P P E A R A N C E S:

TAYLOR W. DANIEL, ESQUIRE
Attorney for the State

RICHARD J. DOLCE, ESQUIRE
MICHAEL V. LAUBSHIRE, ESQUIRE
Attorneys for the Defendant

ORIGINAL

Margaret A. Woods
Circuit Court Reporter

THE COURT: Alright, this is in the, uh, case State a South Carolina vs. Tony Latrell Kinard, it's a Newberry case, a matter's before the Court today upon the State's motion for reconsideration. I have signed the order today without prejudice to the motion for reconsideration 'cause ya -- that had been filed sometime previous so if ya'll wanna pick up your copy, uh, . . .

(Whereupon, a discussion was held off the record.)

THE COURT: Alright, uh, now before I hear from the State they're the moving party, Mr. Dolce, you, uh, indicate you have a matter for the Court?

MR. DOLCE: Yes, I do, Your Honor, and I I I would like everybody to hear me to completion on this before they react. Uh, there's an e-mail in the file in which the solicitor in this case alleges that defense attorney has acted unprofessionally and, uh, is unreliable and untrustworthy so now it's up to us to act as professionally as possible. In this case, Your Honor, we don't dispute the motion for reconsideration has not been signed by counsel submitting it as required by Rule 11 nor has it ever been served on us properly except for e -- by e-mail so we would appreciate if counsel for the State, Solicitor, would properly sign the motion and we will accept service of it so we can move forward today.

THE COURT: Alright, alright, very good. You, uh, you

have a copy, you want the, your copy you want that signed?

MR. DANIEL: Your Honor, I've I've' e-mailed him a signed copy, they should have it.

MR. DOLCE: Your Honor, that the motion itself isn't signed, it's service by e-mail, it's not allowed or permitted by the rules, if I were in charge it would but I'm not in charge and it isn't.

THE COURT: Right, okay. How 'bout just signin' their copy and then they will, uh, for the record they're accepting service.

MR. DANIEL: Yes, sir.

MR. DOLCE: On the motion. On the motion, the motion. You've ---

MR. DANIEL: Sure.

MR. DOLCE: --- signed the, you've signed the attachment, you haven't signed the motion.

MR. DANIEL: Oh, okay.

MR. DOLCE: Thank Your Honor and for the record on behalf a the defense we're accepting service ---

THE COURT: Okay.

MR. DOLCE: --- on the motion, we're also accepting service of the order and we're waiving any 10-day period or ---

THE COURT: Yeah.

MR. DOLCE: --- anything else required by the rules so

that we can have ---

THE COURT: Yeah, ---

MR. DOLCE: --- a hearing today.

THE COURT: --- alright, very good. Thank you very much. Give me just a moment, please.

(Pause.)

THE COURT: Okay, uh, Solicitor Daniel, uh, you are the moving party so I'm gonna hear from you first.

MR. DANIEL: Thank Your Honor, may it please the Court, ---

THE COURT: Sure.

MR. DANIEL: --- and, Your Honor, you do have a copy of our our motion ---

THE COURT: I I I do.

MR. DANIEL: --- for reconsideration, of course the order that you just signed, they, uh, I guess for purposes of hearing, uh, I know we've gone over the facts before, um, I guess I would make court's exhibit the two incident reports that are pertinent in this case: the highway patrol's report and the Newberry Sheriff's Office report, ---

MR. DOLCE: And and ---

MR. DANIEL: --- ask the ---

MR. DOLCE: --- we object, ---

MR. DANIEL: --- Court take ---

(Indiscernible cross-talk.)

MR. DOLCE: --- this isn't an evidentiary hearing, Your Honor, this is on a matter of law, it's a reconsideration after signed order, nothing can be added to the record at this point.

THE COURT: Well, it, is it, it, I, I mean, I can't accept any evidence, is it going to, uh, assist in some way, uh, clarification of your various points that you've made in your motion?

MR. DANIEL: Yes, sir.

THE COURT: Alright, I'm not gonna mark it as an exhibit but if -- I, I mean, I'll look at it and I'm not taking it for evidentiary purposes 'cause I have to look at what was presented at the, uh, at the hearing but if you just wanna hand it up and I'll give it whatever consideration or weight that it, uh, deserves.

MR. DOLCE: Of course, Your Honor, counsel has to provide us with copies of anything he hands up to the Court.

THE COURT: Alright, do you have an extra copy to provide to, uh, ---

MR. DANIEL: Uh, ---

THE COURT: --- Mr. Laubshire and Mr. Dolce?

MR. DANIEL: --- I do not, Your Honor, just what they would have in their discovery file already.

THE COURT: Okay. What I'm loo -- what he's handed me, Mr. Dolce, is is actually two documents both of which indicate

they are incident reports, the first is two pages, looks like it's been dated November 4th of last year and then the other incident report is six pages and doesn't look like it, well, yeah, it is dated too, uh, November 3rd, so November 3rd, November 4th, do ya'll have that in your file, if not ---

MR. DOLCE: We're we're checking ---

THE COURT: --- we'll make it ---

MR. DOLCE: --- but ---

THE COURT: Yeah.

MR. DOLCE: --- but I would, I would comment that it's long been ruled that incident reports are hearsay not admissible.

THE COURT: Right.

MR. DOLCE: They they might be valuable in preliminary hearings, ---

THE COURT: Right.

MR. DOLCE: --- I'm not sure why on a, why in a motion to reconsider a signed order that they would be, they would be helpful or acceptable to the Court but of course Your Honor has discretion.

THE COURT: Alright, thank you. Mr. Laubshire, you have that?

MR. LAUBSHIRE: Judge, I have a second one I believe but mine's only five pages not six and I do not s -- appear to

have a copy of the first one that's two pages.

THE COURT: Okay, alright. Uh, well let's go ahead and, uh, take a very short break and, uh, uh, madam clerk, would, could I impose on you to make me a copy of ---

THE CLERK: Yes, sir.

THE COURT: --- these documents?

THE CLERK: Um-hum.

THE COURT: Everybody be at ease.

(Whereupon, a recess was taken.)

THE COURT: Okay, we are back on the record and, uh, Solicitor, you wanna proceed with your argument?

MR. DANIEL: Thank Your Honor, and again, just kind of a brief, uh, summation of the facts. Uh, this is a a DUI case stemming from November 3rd of last year incident date, uh, it involves a two-car collision, uh, that occurs around, uh, 6:30 p.m., it's dark at this point 'cause it's November, November 3rd, 2015, uh, the, uh, defendant Tony Kinard is operating a, uh, a Mazda car, a two two-door Mazda vehicle, he rear-ends, uh, another motorist who's traveling in a Chevy pick-up truck, Vic Theriot, and this occurs, uh, Exit 74 I-26 westbound Exit 74 ramp. Uh, Vic Theriot in his Chevy truck exits right there on mile marker 74, he's at the stop sign, he would testify to, uh, Mr. Kinard approaching him at a high rate a speed, doesn't really even see the lights and all of a sudden is rear-ended. Uh, the Chevy truck that the Vic Theriot's in goes forward

onto Highway 34 and Mr. Kinard's vehicle is got, uh, essentially totaled, front-end damage, so you have fire trucks, EMS, uh, they arrive the scene prior to law enforcement. Uh, the first law enforcement, uh, officer on scene is Deputy Jesse Snelgrove of the Newberry Sheriff's Office, uh, he arrives a little before seven o'clock and a few minutes after that is when the highway patrol, uh, Mickey Barnett, Trooper Mickey Barnett arrives, he's the arresting officer, uh, but prior to this becoming a DUI investigation, it's just a traffic accident, uh, and they're suspecting injuries, uh, so that's why you got EMS and fire trucks out there. Uh, that intervening time before law enforcement arrives you have, uh, EMS or the fire truck, uh, Daniel Works, he's a member a the Friendly Fire Department, he observes, uh, Mr. Kinard ---

MR. LAUBSHIRE: Judge, ---

MR. DANIEL: --- appear to be drunk ---

MR. LAUBSHIRE: --- I have objection, uh, as to these facts, uh, only for the purposes of ---

THE COURT: Right.

MR. LAUBSHIRE: --- this hearing.

THE COURT: Right.

MR. LAUBSHIRE: We had testimony at the hearing and those facts are on the record. These are facts that are outside the ---

THE COURT: Well ---

MR. LAUBSHIRE: --- hearing and Mr. Works never testified, the vic -- alleged victim in this case never testified ---

THE COURT: --- alright, I understand and just just trust me that, uh, I remember what was, uh, uh, presented at the hearing and what was not, okay?

MR. LAUBSHIRE: Yes, Your Honor.

THE COURT: Thank you. Go ahead.

MR. DANIEL: Yes, sir, so fire truck and EMS are on scene, uh, also, a Megan Fryer (phonetic) who's actually the registered owner a this Mazda vehicle that Mr. Kinard was operating, she arrives on scene before law enforcement gets there and that's when, uh, they observe open containers bein' removed by Ms. Fryer from the vehicle and so once Deputy Snelgrove arrives, uh, he's first law enforcement on the scene, he has relayed all this information from fire truck, uh, fireman Daniel Works and so at that point he a approaches Mr. Kinard, Mr. Kinard's belligerent, you heard testimony from Deputy Snelgrove squares off at him, has kind of a, he he described it as thousand-yard sta -- a thousand-yard stare, he's combative, uh, usin' profanity, there's a gas station across the street so he's essentially taken into custody for disorderly conduct, uh, so it's really hasn't transformed fully into a DUI even though that's what's expect, that that's

kinda what they're leaning towards but at first they have to, uh, neutralize Mr. Kinard as to his threat, they're on the interstate, so he's taken into custody by Deputy, uh, Snelgrove so then you have, few minutes after this you have Trooper Barnett arrive on scene and so he's relayed all the information about open containers, the fact that there was a wreck, Mr. Kinard's behavior, uh, and eventually he gets the open containers turned over to him, Trooper Barnett does, so then it's it's full on DUI investigation. Uh, this whole time Trooper Barnett, uh, he never, uh, gets to interview Mr. Kinard, he's gettin' all this information, it's not until, uh, Mr. Kinard is that he's in the back of, uh, Deputy Snelgrove's patrol car that that the trooper approaches him. The trooper's car is positioned right behind, uh, the deputy's patrol car, they're they're too, uh, concerned about about Mr. Kinard's, uh, demeanor and his -- he's he's very belligerent and his combative nature, it's too dangerous for them to remove him, uh, 'cause he squared off with a deputy so he was a threat to himself and others and again, they're on the side a the interstate and the, and the liability involved of of bringing a combative defendant detainee outs, outta the back of patrol car, uh, just wasn't gonna work so the trooper already had his probable cause at that point. Uh, all the witnesses on scene they could smell alcohol comin' from Mr. Kinard, essentially open containers and, uh, fact that he

rear-end a vehicle, all signs of impairment. At that point Trooper Barnett makes a decision to place him under arrest for DUI. Now he's already, uh, in detention for disorderly conduct in the back of Deputy Snelgrove's patrol car so you can see on the in-car video on, uh, Trooper Barnett's in-car video where he is talking to, uh, Mr. Kinard in the backseat a the patrol car, it's about a hour-long video, to be honest I don't even think we would play at trial because all things f -- of evidentiary purposes have already occurred for the DUI 'cause Mr. Kinard's never taken outta the backseat of patrol car because he's a threat to him elf and others, his bellicosity, his -- he's just combative towards everyone but you do see where, uh, Trooper Barnett says, You're under arrest for drivin' under the influence and this is the point of contention, uh, once he's placed under arrest Trooper Barnett can't administer any field sobriety test because Mr. Kinard they can't take him outta the back patrol car so one-leg test, a walk-and-turn test, uh, all that's out the window, HGN, they can't do that, they can't get him outside of Deputy Snelgrove's patrol car, so Trooper Barnett knowing that, uh, tells him, You're under arrest, and then, uh, administers his Miranda warnings. Now the clarity of Trooper Barnett's in-car video and the fact that it's night and you have flashing lights you can't see really Trooper Barnett 'cause of the glare, uh, but ---

THE COURT: Now ---

MR. DANIEL: --- Tony ---

THE COURT: --- let let me just, ---

MR. DANIEL: --- Kinard ---

THE COURT: --- let me just interrupt ya. I -- it -- but, uh, from what I remember the video I think you can, uh, you know, see, from what I recall you could see Trooper Barnett fairly well, I mean, it wasn't crystal clear, wasn't perfect but I think you could see him okay ---

MR. DANIEL: Yes, sir, it may have been like a a ---

THE COURT: --- and ---

MR. DANIEL: --- silhouette ---

THE COURT: --- you could hear his, ---

MR. DANIEL: --- outline.

THE COURT: --- and you could hear his voice, yeah, as he was talkin' to Mr. Kinard so but anyways go ahead, I didn't mean to interrupt.

MR. DANIEL: Yes, sir. Uh, it's just a, the clarity is is something to be desired just given ---

THE COURT: Right.

MR. DANIEL: --- the fact it's night, flashing lights, uh, but clearly audio's working, we can hear everything very well, ---

THE COURT: Yeah.

MR. DANIEL: --- uh, and so but ya can't see Mr. Kinard

because he's in the backseat a Deputy Snelgrove's patrol car, they can't get him out, uh, but you do hear the Miranda warnings being administered in full and, uh, course the argument was, uh, they moved for dismissal on the violation that, uh, the violation of the videotaping requirements that Miranda warnings were not shown at the time a the arrest.

THE COURT: Right, the defendant, I I -- let let's make sure we we all are in agreement as far as the narrow issue involved is the fact that, uh, the defendant is not seen in the video when Miranda was ad -- administered and the arrest took place, that I think that and and then a course then whether or not that the, uh, the statute requires that or not, I know that there there's difference of opinion but it's the, that's the, the narrow issue is whether or not the video requires the defendant to be in the video when the Miranda is administered and the arrest made, correct?

MR. LAUBSHIRE: Yes, Your Honor.

THE COURT: Okay, and y -- and you agree with that too and a course ---

MR. DANIEL: Yes.

THE COURT: --- I know you -- your interpretation of the statute, uh, uh, is that the statute doesn't require you, I understand that, but as far as the the the factual issue, he's not shown on the video and, uh, at least up until this point the Court has ruled that video requires that so I just wanna

make sure that we we understand what the the narrow issue is. May proceed.

MR. DANIEL: Thank Your Honor. Yes, sir, and and that is the narrow issue. Uh, like I said, the, uh, the incident's on recording, the in-car video it's about a hour long. Now at the time Miranda is administered, like I said he's in the backseat a patrol car, defendant Kinard, but if you watch the video in full you can clearly tell that there's someone in the backseat a that car, in fact, Mr. Kinard at certain points begins talking. Now during this, uh, pertinent exchange with, uh, Trooper Barnett during the Miranda, Mr. Kinard's silent but he is in the backseat a that patrol car ---

THE COURT: Alright.

MR. DANIEL: --- and there was testimony to that effect, so we know he's back there and you hear Miranda being administered and so the Court I believe fashioned its ruling very narrowly just for the fact that a dismissal was proper because, uh, Miranda was not shown but you also ruled, Your Honor, I believe that, uh, under subsection B of 2953 that recording was practicable but we still did not conform. I believe that was kinda, you read that statute right before you ordered the dismissal, uh, verbally in court.

THE COURT: Well and I, and I guess what we have to look at is, uh, uh, uh, what the order that I, that I sign today if it, uh, if it makes that particular finding but we'll we'll

we'll get, we'll get through that, go ahead.

MR. DANIEL: And so in a sense, uh, it's essentially we have a three-prong argument of why dismissal's not the appropriate remedy, uh, first point being the video does comply with 2953 subsection (A), uh, Miranda is shown for purpose of the statute, uh, I believe the Court was equating "show" with "see," uh, and so I kinda, we go into, uh, ya know, statutory interpretation of course and there's no case law directly on point, uh, interpreting the word "show" Miranda but our argument is simply that "show" Miranda in the context of hearing something, "show," uh, the only meaningful way to show something is to hear it which you do. Uh, in this situation, Your Honor, it would've required Trooper Barnett and with the assistance I'm sure of Deputy Snelgrove to pull a combative defendant out of a patrol car just to put him in front of a in-car camera to administer Miranda warnings, uh, putting everyone in great danger in that situation and I couldn't advise and and Trooper Barnett asked me this what could he have done differently and I told him out of abundance of caution I would not have done anything differently because Mr. Kinard's demeanor that night put everyone in jeopardy and so to take him outta the backseat patrol car just to, uh, have Mr. Kinard seen on video while Miranda's being administered would have been a great risk, uh, to everyone, Mr. Kinard included, they're on the side a the

interstate, this is a traffic accident case first and foremost, uh, so that was, that's my understanding of the word "shows" and Black's Law Dictionary, you look up "show" in Black's Law Dictionary the seventh edition it it defines "show" as, it defines the word "show" as, "To make apparent or clear by evidence; to prove," so nowhere in Black's Law do they define "show" as to see and guess I was tryin' to think of a way, Your Honor, to put it in context, uh, to actually show Miranda 'cause Miranda's a auditory and verbal kinda function, only way that would be meaningful to have Miranda shown on tape, to have Mr. Kinard visibly present is if your audience is sign language, uh, that wo -- that'll be the only way I could think of Miranda being seen 'cause otherwise Miranda's heard and the video captures that 'cause the audio's working, uh, and again, they're not alleging any Miranda violations and there no field sobriety tests administered, no HGN and no walk-and-turn, one-leg stand because he's too combative to take outta the car, they're afraid he's gonna assault them or run out in the interstate, he's too belligerent. Uh, ---

THE COURT: Well how how do we know that, alright, let let's accept as a matter a fact that sometime prior to the Miranda arrest that he was combative, that and and he was charged with disorderly conduct, that was sometime back, how do we know that at the time of Miranda being given that he was

still combative, uh, how how do we know that? He's in the backseat a the car for some period of time but I I don't know how long that is but, uh, some period of time, how do we know that just because he was combative, I'll say fifteen minutes, thirty minutes prior, that he's still combative now to where there was a a a risk of some sort to have him taken outta the car, how how do we know that, uh, because I don't think Trooper Barnett ever attempted to get him outta the car or anything that was said or do -- I realize the thousand-yard stare, I think that's how Trooper Barnett phrased it, uh, but how do we know he's still combative?

MR. DANIEL: Your Honor, Trooper Barnett, uh, he's relying on what the witnesses on scene told him, uh, he's relying on Deputy Jesse Snelgrove ---

THE COURT: Well ---

MR. DANIEL: --- who we heard ---

THE COURT: --- no, no, uh, ---

MR. DANIEL: --- testimony ---

THE COURT: --- and ---

MR. DANIEL: --- from.

THE COURT: --- I I know I'm interruptin' ya, I I - let's take it as a matter a fact that yes he was combative thirty minutes prior, okay, because of what the witnesses said but how do we know that he's still combative right prior to the Miranda being given without there being some effort to get him

outta the car, whatever, how do we know he's still combative, that's that's my question.

MR. DANIEL: Well, Your Honor, again, they're on scene and this all takes place within an hour, uh, by the time Trooper Barnett arrives, he arrives just minutes after Deputy Snelgrove so this is essentially real-time and so he's hearin' Deputy Snelgrove say that so it it would be a, you you'd be asking him to predict whether Mr., uh, Kinard would still be combative and I think once a de -- a detainee has proven himself's combative, law enforcement would be at great risk to bring that person right out, there there's not a significant time lapse here we're talkin' about ---

THE COURT: Okay, alright.

MR. DANIEL: --- and again, you are by the interstate, uh, and he's kinda, uh, he's representing an imminent threat to these officers and, Your Honor, there's also, which we didn't make part a the evidentiary record 'cause we didn't get that far, at trial we would have played, uh, the video from the datamaster room and Mr. Kinard is belligerent in there. He's, uh, he's spitting in Trooper Barnett's face, uh, when he's talking, he's, uh, he takes on kind of a, what they describe as a God-like complex, uh, this air of an invincibility, it it's just nonsense what he's speaking. His pants are at his ankles, he had urinated in the backseat of the, uh, deputies patrol car ---

THE COURT: Right.

MR. DANIEL: --- and you can see his demeanor with Trooper Barnett in the datamaster room and if it's any indication in the datamaster room and that's after what happens in the scene, he's still combative there so if we're predicting how Mr. Kinard would have acted, it woulda been very risky for the, uh, for the trooper and the deputy to pull him out just for the purposes of him being seen on camera while Miranda was, uh, administered.

THE COURT: Yeah, and to just just let let the defense be rest assured that, uh, whatever I base my decision on will be one hundred percent on whatever was presented at at the hearing and I realize I've given great latitude to the solicitor to get into some other areas that you feel like might be prejudicial, I understand that and I wasn't tryin' necessarily to cut you off short but just please rest assured that, uh, uh, these these extra things that, uh, the solicitor's bringing out if it was not part a the record when I made my ruling I'm I'm not gonna consider it and I'm gonna give ya'll the same latitude, uh, ---

MR. DOLCE: And and ---

THE COURT: --- in in ---

MR. DOLCE: --- and in saying ---

THE COURT: --- letting ---

MR. DOLCE: --- that, and in saying that, you assured me

that my objection was, uh, preserved.

THE COURT: Right, right, it it it is. Uh, so, uh, let me ask ya this for solicitor, okay, let's let's say for the sake of argument that there was a violation of the video statute, and I know you're not conceding that but just for the sake of my my question, and I know you put in your memorandum that you felt like maybe a dismissal was a little bit, uh, uh, severe, uh, uh, for the violation, what would be, uh, what would be the appropriate remedy for this court to take, again, assuming for the sake of my question that there was a, uh, a a violation of the, uh, uh, video statute, where, where's it, where's a middle ground on this?

MR. DANIEL: Yes, sir, and and I have two more points and and I'll address that. Well I guess to answer your question, Your Honor, uh, I found a a case it's it's very on point actually and I, it's cited in my, uh, my memo, uh, *State v. Henkel*, it's a, uh, South Carolina Supreme Court case, uh, decided last year, uh, 413 S.C. 9, and so that's a scenario where a non-compliant video, so for the sake of argument let's say there is a Miranda violation, it's a non-compliant video for that reason but that case stands for the proposition that dismissal is not proper under 2953 subsection (B) which are kinda the, uh, safety valves if you have a violation and so that includes traffic accident investigations and that's what the *Henkel* case involved. Uh, it involved that the facts in

that case were, uh, it's a one-car collision, by the time the trooper gets on scene, uh, suspect had fled but there's open containers, the smell of alcohol in the vehicle. Eventually they catch up to the suspect, uh, sometime later walking down I-385, they already have a name from the registration the vehicle, uh, at that point, uh, EMS is called on scene because there's, uh, injuries, uh, uh, this suspect, defendant, suffered injuries in the wreck, so you have ambulance on scene and the trooper that point, uh, thinks he's about to be transport the hospital, the defendant, so he, uh, Mirandizes him and does a HGN test in the backseat a ambulance and so nothing's caught on the in-car video system, uh, eventually though the ambulance says he's fine, we'll discharge him, he doesn't need go the hospital and so, uh, the defendant in the *Henkel* is taken, uh, is placed into custody for DUI but that case stands for the proposition that, uh, strict compliance, uh, with Miranda in that scenario would eviscerate, uh, the 2953 (B) exceptions and I would, uh, I have that case printed out and it's in my memo but some language in that case, Your Honor, and a course they go to statutory, uh, construction, "The primary rule a statutory construction is to ascertain and give effect to the intended legislature," and so and they cite how, uh, that the recording the videotaping statute is meant to create direct evidence of a DUI arrest such as field sobriety test 'cause the legislature when they passed that

that statute envisioned the scenario of a police officer and the defendant being the only witnesses and so they wanted the police officer to ha -- capture objective evidence of impairment such as field sobrieties test and things like that, the the demeanor and conduct of somebody but they also recognized that in traffic accident investigations things are chaotic, it's a very fluid situation so that's why they put exceptions there and so the *Henkel* case interprets that because at root in *Henkel* is a traffic accident first and foremost 'cause it's a collision that the trooper responds to and so, uh, the Court of Appeals initially ruled with the defendant, uh, but Supreme Court had to reverse the Court of Appeals and they interpret it, uh, the as soon as videotaping is practical -- practicable language ---

THE COURT: Right.

MR. DANIEL: --- it applies both to when the videotaping must begin and what it must show in order to conform to the requirements of subsection (A) and so it, basically they said that it would kinda be, uh, against statutory, uh, or legislative intent, it would go against legislative intent if they required the officer to perform Miranda warnings, uh, anew in order to capture them on videotape if they were first performed prior to when videotaping became practicable and so and what they mean by the, uh, videotaping becoming practicable is when they actually would need to conform with

the requirements of 2953, so just because we have a videotape in this case it's it's almost not even a factor, it's when the videotaping becomes practicable that it can conform to the requirements of, uh, 2953 (A) and here I guess I would argue as my secondary argument it never becomes practicable because they can't show Miranda because Mr. Kinard's remains too combative, it's too risky, an exigency is created by Mr. Kinard's own conduct, uh, and so that language is very, very telling, they say, Requiring an officer to repeat ra -- rama -- repeat ra -- Miranda and field sobriety test on camera in a situation contemplated in subsection (B) is not consistent with legislative intent of the DUI recording statute, uh, and they of course talk about how subsection (A) was intended to capture the interactions and field sobriety testing between the subject and officer in a typical DUI traffic stop where there are no other witnesses, and so essentially Justice Pleicones's holding was that the officer's failure to a videotape administration of Miranda warnings which occurred prior to the time in which video recording became practicable did not require dismissal, so there you don't even have videotape, uh, being recorded, uh, audibly, there's no audio recording 'cause he's doin' Miranda warnings in the back of an ambulance, uh, eventually he doesn't have to go to the hospital in *Henkel* but that's essentially and I I feel like these facts are very dispositive here, uh, are are

very identical almost, uh, and so I would offer *State v. Henkel* as as a proposition to support our argument.

And I guess, Your Honor, my third point, uh, I believe you wanted me to kind of a get into, even if you do assume that, uh, subsection (B) exception doesn't apply and the videotaping just does not satisfy the requirements, the *State v. Gordon* case which is also in my memorandum of law, uh, it's a South Carolina Supreme Court case from last year, 414 S.C. 94, uh, that discusses the proper remedy would be redacting the video, not outright dismissal, uh, but I would say the *Henkel* is probly my strongest argument that's supported by case law, again, there's no case law that supports my argument where, uh, sh -- Miranda being shown that particular portion is interpreted but I would just say that Black's Law Dictionary does not define "show" with "see," what matter is Miranda is heard and perceived, uh, and, again, uh, I think just having the defendant, uh, be placed in fronta the camera would add nothing to this this case, Your Honor, it would bec -- it would be a hyper, uh, technicality and it would be, uh, an extreme remedy as the *Gordon* court, uh, annunciated.

THE COURT: Course the, when when the defendant was put in the, uh, the car, that was prior to the trooper getting there, consequently there was no video showing Kinard gettin' in the backseat, correct?

MR. DANIEL: That's correct, Your Honor.

THE COURT: Yeah, okay. Alright, thank you, Solicitor, uh, ---

MR. DANIEL: Thank you.

THE COURT: --- which, uh, which lawyer for the defense gonna -- okay, Mr. Laubshire.

MR. LAUBSHIRE: Judge, just starting with the first point regarding combativeness Mr. Kinard, uh, Court reviewed the video, there was testimony, uh, from both the deputy and the highway patrolman, there's testimony that he had broken leg and that could have been the reason for his stance. He wasn't charged with resisting arrest, he wasn't charged with assaulting an officer, he wasn't charged with any kind of assault of any kind by Snelgrove, there was no affidavit produced by Deputy Snelgrove either to remedy the problem of the no videotape, he was essentially handcuffed and put in the back a the car by the time the trooper arrived. As far as practical, the video is running as the trooper drives up to the scene so the video's running the entire time and Your Honor found that subsection (B) doesn't apply to this case considering we have the video from the beginning of the time the trooper got there ---

THE COURT: Right.

MR. LAUBSHIRE: --- so subsection (B) being inapplicable. As far as the combativeness of Mr. Kinard, he doesn't exhibit anything on that video towards the trooper that would indicate

any kind of combat or aggression or anything, the trooper doesn't even ask him to get outta the car, all he does is just tell him he's under arrest and recite Miranda. We have no idea the condition of Mr. Kinard: we don't know if he's sleeping, we don't know what's going on, can't see him but there was no effort made by the trooper to get him outta the car, there was no risk of having him step outta the car, there's no risk in even asking him. If he would have asked, we would have found out if he was going to be combative or not but they made absolutely no effort to get him outta the car. I've seen hundreds of these videos, it is not uncommon for this to happen where they ask the person to get outta one car, walk in fronta the camera, do field sobriety tests, read Miranda, placed under arrest, this is not an uncommon practice, it's also not an uncommon practice in law enforcement if you have one officer who a person has a problem with to simply exchange officers and see if the second officer can develop a rapport with them and see if we can calm the situation, de-escalate everything but there is no video to show any kind of escalation and him not being charged with resisting or assault or anything like that by Deputy Snelgrove is kind of telling, it's just public disorderly conduct, so as to the first argument, uh, where there's this combat issue, there's nothing on the video suggests that he was combative toward the trooper or that getting him out would have caused

any kinda problem with the trooper or Deputy Snelgrove at all.

THE COURT: Alright, let me ask ya this, Mr. Laubshire, let's just assume again for the sake of this question that on the video that Mr. Kinard was combative towards, uh, the, uh, Trooper Barnett hollerin' and screamin' at him, threatening him, whatever, uh, and even go so far as trooper tryin' to get him outta the car and couldn't, so you have some a that on the video, then would you believe that then if Miranda was given without showing the defendant after all that combative stuff had taken place you think the video woulda been complied with then?

MR. LAUBSHIRE: Judge, I think the simple solution that case would have been subsection (B) then immediately applies and we solve that problem with an affidavit that indicates, We asked Mr. Kinard to exit the vehicle, he would not, Miranda was read, and you can check the appropriate box or write in your own affidavit and let everyone know that this is the situation, this exactly what happened, it's on the video, that is the s -- that's the purpose of subsection (B) for things like that and as we saw when he discussed *Henkel* it's a totally different case, it's not -- it's like the guy in in *Henkel* runs away from the scene, it's a single-car wreck, there's no witnesses, this a totally different case. This is a situation where they're searching for a defendant, they've

already got this guy in handcuffs with a broken foot and they're tryin to tell us that he's gonna be some kind of combative imminent threat to everyone: a man with a broken foot in handcuffs, I just don't see how that's possible and this, the remedy would have been very easily an affidavit using subsection (B) but they didn't take that route and since the video does exist and those facts aren't present (B) doesn't really apply so that's that's our position on his first point with the combativeness which doesn't exist and there was no attempt by the officer to do anything to get him outta the car to comply with the videotaping statute. They are not necessarily on the side of the interstate, they're on the exit ramp, there's plenty of lights to indicate there's some situation going on to warn oncoming drivers, uh, so I don't see how this could be a problem to accommodate situation and have him exit the vehicle and comply with the statute and I think the solicitor pointed that out the very end that this wouldn't do anything, well actually it would, it would comply with the statute as the legislator mandated it and that's the reason they did it and if you look in, uh, the *Mount Pleasant* case it's instructed that the legislature hasn't mandated videotaping or any other case, they haven't done it for armed robbery or confessions or anything in murder trials, nothing, but they have in fact mandated it for DUI and it's right in the opinion that considering that they have the ability to do

that and they haven't, they intended strict compliance and they also mandated a very, very serious sanction for noncompliance so they must have intended that it's be strictly complied with and it just wasn't done in this case.

So moving on to his second point which was the *Henkel* case, that's all about subsection (B) and how it can apply to a very different factual pattern. Mr. Kinard didn't run from the scene, he didn't leave anything behind, that there's a two-car collision, the videotape doesn't not begin from the beginning, there -- everything about the *Henkel* case is different than this case even leaving behind the fact that *Henkel* is under a totally different law. When *Henkel* came out, Miranda was required to be read twice, the laws in fact changed in this case and *Henkel* is not really applicable under the current statute since its amendment February 10th 2009 so I'm not sure how *Henkel* applies under the new statute considering it's about our old statute, let alone the facts are so different, it's trying compare baseball to football, they're not even close, nothing about them is the same and it's about subsection (B) which does not apply to this case at all.

And as to *Gordon*, *Gordon* is a field sobriety test case that specifically deals with field sobriety testing, what you can see, what you can't see about a field sobriety test, it's not an issue in this case at all. This is specifically about

part 2 and 3 a the statute which indicate the, uh, field sobri -- not not the field sobriety test but the reading of Miranda and also the arrest. Court, circuit court opinions that we presented at the hearing indicate that Black's Law Dictionary does in fact say what "show" means and it's actually in the opi -- in the order that Your Honor signed that specifically says that "show" means something that someone views and looks at, at the same time hears. I'm not sure where the solicitor's going with hand signals and gestures, I've seen hundreds a these videos, "show" means bring the person in fronta the camera and read them Miranda rights and tell them they're under the arrest. I'm not sure how far out that has to go, that's very simple, it's very clear on its face, the statute's clear on its face and under *Roberts* it's very clear that the s -- legislature mandated very strict compliance within the statute and a sanction imposed is also very severe so we're asking court to uphold its initial ruling in this case and dismiss it.

THE COURT: Is it an all-or-nothing, uh, situation or is there middle ground such as, uh, uh, suppressing the video or something akin to that or do you believe it's an all-or-nothin'?

MR. LAUBSHIRE: Judge, I believe the statute is all-or-nothing. I don't see anywhere in the statute that says that we can start suppressing pieces of of evidence as a remedy, I

think the remedy is in this case is an outright dismissal. Uh, the quick fix if they really wanted to fix this case would have been to submit that affidavit prior to that hearing, they just didn't do it. I'm not sure why if they really felt that was true or why he wasn't charged with these assa -- alleged assaults or resisting arrest or whatever they're alleging, I'm not sure why it didn't happen either but they had every opportunity in the world to make this case and they didn't do it and it's an all, it is an all-or-nothing analysis by the statute and also by the circuit court opinions that were presented to Your Honor from Judge Hayes that indicate "show" must sh -- it's exactly what it says, show it, and it didn't, requires dismissal, Your Honor.

THE COURT: Alright, thank you. Anything in brief r -- or, Mr. ---

MR. DOLCE: Your ---

THE COURT: --- Dolce ---

MR. DOLCE: --- Your Honor, may I add ---

THE COURT: --- wanna add ---

MR. DOLCE: --- one ---

THE COURT: --- something?

MR. DOLCE: --- thing to that ---

THE COURT: Sure.

MR. DOLCE: --- because the question has been asked what difference does it make if the person is actually seen in the

video and in my mind the legislature may have had something in mind. First, this is a person who allegedly is impaired, might be very impaired, we don't know, I don't know whether they're impaired enough to actually understand what they're being told, we don't see 'em, we don't know whether they're paying any attention to it so I think the legislature was saying under these circumstances we need to actually see that the person who was receiving their Miranda rights participated, uh, understood, was reactive, didn't nod off, didn't fall asleep, wasn't looking somewhere else or paying or not paying attention because the fact that there is an impairment alleged here would also go to whether or not the person understood, accepted his a -- Miranda rights and knowingly signed 'em and knowingly waived 'em so I think that this requirement of the Miranda rights being on the video is beneficial to the courts in re, uh, resolving these cases, it's beneficial to the State in seeing that the Miranda rights were actually properly administered and knowingly accepted rather than by somebody who was unconscious or in daze or couldn't understand or couldn't speak or whatever, so when we look at the reason what difference does it make, that's the difference and I think that's what the legislature may have had in mind and I submit that to the Court that that is very important and that the legislation is very specific on the fact that it has to be seen. Thank you.

THE COURT: And thank you very much. Anything in brief reply, Solicitor?

MR. DANIEL: Yes, sir, Your Honor. As far as the affidavit goes, the the *Manning* case is directly on point, Your Honor, that's a, that's a Court of Appeals 2012 decision, 400 S.C. 257, a traffic accident investigation, that was a felony DUI case in *Manning,* uh, they had absolutely no video and no affidavit and, uh, they're saying that no affidavits are required, uh, when it's a traffic accident, uh, so the affidavit issue is very straightforward in that no affidavit is required that, uh, when you're dealin' with a traffic accident investigation, uh, and, again, I'm usin' the seventh edition, Black's Law Dictionary Seventh Edition, I saw a copyright of 1999, "show" did not have the word "see" at all in there, "show" said, "To make apparent or clear by evidence; to prove," uh, and again, context matters, Your Honor, if we're talkin' about somethin' that has to be heard, seeing it would would not be meaningful, it's hearing it and we do hear it and we know from watching the video in in totality that Mr. Kinard is in the backseat a that patrol car and, uh, he's non-responsive in that patrol car, he's not really talking to troopers, uh, and again, there are, they're not alleging a Miranda violation here, Your Honor, I think that's that's important. There's nothing meaningful that would be conveyed on that video and I submit if it weren't for the fact that I

would be concerned about a defense arguing to the jury that we be hiding the incident cite recording, it offered, it really does nothing for our case to have it admitted into evidence because everything that's, uh, that we would intend to prove at trial would be from the open containers found at the scene and the datamaster video at the jail, his conduct there and then a course testimony from our witnesses but as far as what they're alleging the video at the incident cite, it offers nothing, uh, and again, *Gordon* talks about, uh, suppressing stuff as the remedy instead of an outright dismissal particularly in this case when it's just a they're alleging a Miranda violation, it wouldn't be to throw out the entire case.

THE COURT: Alright.

MR. DANIEL: Thank you.

THE COURT: Alright, thank you very much. Uh, I'm gonna take a look at this a again and, uh, reread some a those cases and, uh, I'll let you guys know somethin' soon as -- did you wanna ---

MR. LAUBSHIRE: Could ---

THE COURT: --- add to it ---

MR. LAUBSHIRE: --- I ---

THE COURT: --- one more thing ---

MR. LAUBSHIRE: I I would, ---

THE COURT: --- out there?

MR. LAUBSHIRE: --- Judge, I'd like to just respond to the *Manning* issue. Uh, in *State vs. Manning* that's also nothing like this case, it's felony DUI, when the trooper showed up, no one was on scene, everyone had gone to the hospital so the officer didn't run video on anything 'cause there was nothing to run video on, everyone was already gone. He didn't submit a video 'cause there was nothing to videotape, completely different case, has nothing to do with this factual scenario considering everyone was on the scene and he had a video so it's not that traffic accidents don't need video, it still is, it's still when it becomes practicable but in that case it never became practicable 'cause everyone was already at the hospital so that doesn't do us any good to have a video of nothing and I think the Court correctly found that an affidavit wouldn't cure that either 'cause everyone was gone, what were they gonna videotape, there was nothin' there, it never became practicable, very different set of facts here.

THE COURT: Okay.

MR. LAUBSHIRE: *Gordon* as well also had to do with suppressing field sobriety tests because you could see what they're alleging that you couldn't see, also a very different case. In this case we just flat out can't see it, it's not that you, that the magistrate got it wrong and you can actually see the relevant parts like in *Gordon*, this is

completely opposite of that where you don't see anything, he's completely blocked from vid -- view of the camera. Thank Your Honor.

THE COURT: Alright. Alright, thank you very much. I appreciate the hard work from both sides and I'll take a look at this again and let ya know somethin' just as soon as, soon as possible, okay. Thank ya.

MR. LAUBSHIRE: Thank Your Honor.

CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on July 25, 2016 at the time and place heretofore set forth; and that the foregoing pages numbered from 2 through 36, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

August 16, 2016

Margaret A. Woods

Margaret A. Woods, Court Reporter
in and for the State of South Carolina at Large.

WITNESSES

M. L. Barnett

S C Highway Patrol

WARRANT NUMBER

H390372

TRUE BILL

Foreman of the Grand Jury

Date: 1/29/16

VERDICT

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

January Term, 2016

Indictment # 16GS36-0107

THE STATE

vs.

Tony Latrell Kinard

INDICTMENT FOR

DUI / Driving under the influence

§56-05-2930

CDR: 3363

111

THE STATE OF SOUTH CAROLINA

INDICTMENT FO 112

COUNTY OF NEWBERRY

DUI / Driving under the influence
§56-05-2930

At a Court of General Sessions, convened on the 29th day of January, 2016, the Grand Jurors of Newberry County present upon their oath:

That Tony Latrell Kinard did, on or about November 3, 2015, in Newberry County, willfully and unlawfully drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive were materially and appreciably impaired; and/or while under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive were materially and appreciably impaired; and/or while under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive were materially and appreciably impaired, in violation of Section 56-5-2930(A) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

Taylor Daniel
Assistant Solicitor

113

Form 438
Rev. 9/10

SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY

UNIFORM TRAFFIC TICKET [redacted]

STATE OF SOUTH CAROLINA VERSUS

FIRST NAME | MIDDLE NAME | LAST NAME

STREET AND NO. [redacted] | CITY | STATE | ZIP CODE

STATE LICENSED | DRIVER'S LICENSE NO. [redacted] | CDL ☐ YES ☐ NO | DRI. LIC. CLASS

VEH. LIC. NO. [redacted] | STATE | MAKE OF VEH | YEAR | COML VEH. | AUTO | PSGR VEH | COMB. | HAZ. MT. | MOPED | MTRCYCL. | OTHER

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT | STREET AND NO. 3239 Louis Rich Rd

DATE OF TRIAL 11 17 20 15 | TIME OF TRIAL 10 AM | CITY Newberry | STATE SC | ZIP CODE 29108

VIOLATION - COURT APPEARANCE REQUIRED YES NO | VIOLATION SECTION NO.

DUI 2nd

OWNER OF VEHICLE | DATE OF ARREST 11 3 20 15

ADDRESS OF OWNER [redacted] | DATE OF VIOLATION 11 3 20 15

BAIL DEPOSITED Jail | NAME OF ARRESTING OFFICER | RANK

DESCRIPTION OF ACCUSED

RACE B | SEX M | BIRTH DATE [redacted] | HT. 507 | HAIR BLK | WT. 155 | EYES BRO

COUNTY | NUMBER 36

DATE BAIL REC'D. 20 | BY

BADGE 93 | TROOP 2

DOCKET NO.

CASE BEFORE
MAGISTRATE ☐ MUNI. COURT ☐
CIRCUIT COURT ☐ FAMILY COURT ☐ FEDERAL COURT ☐

D: S 1 M 2 T 3 W 4 T 5 F 6 S 7

NAME OF TRIAL COURT IF DIFFERENT FROM ABOVE

TIME OF VIOLATION MILITARY TIME 1935 | WEATHER C

DEFENDANT: DID NOT APPEAR ☐ APPEARED ☐

I U P S O 1 2 3 4 5 | HWY. NO. 26

DISPOSITION
NOLLE PROSSED ☐ GUILTY ☐
FORFEITED BOND ☐ PLED: NOLO CONTENDERE ☐

MILES 0 | N 1 E 2 S 3 W 4

CITY | CODE

TRIAL BY: TRIAL JUDGE ☐ JURY ☐

VERDICT OF TRIAL IF ANY: GUILTY ☐ NOT GUILTY ☐ | DATE OF TRIAL IF ANY 20

Lat.

JAIL	SUSPEND	FINE	AMT. COLLECTED	AMT. SUSPENDED

Long.

COMMITTED TO: | Vehicle Searched Yes | Arrest as Result of Collision Yes

OFFENSE CODE 99 | B.A. LEVEL Refused

CERTIFIED CORRECT | DATE 20

H 390372

TRIAL COURT COPY

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

State of South Carolina, Appellant,

vs.

Tony Latrell Kinard, Respondent.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Record on Appeal on Respondent 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 28th day of July, 2017.

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CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: _____

WILLIAM M. BLITCH, JR.
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S.C. Bar Number 15608

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ATTORNEY FOR APPELLANT

July 28, 2017

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

State of South Carolina, Appellant,

vs.

Tony Latrell Kinard, Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court erred in dismissing this case based on an erroneous interpretation of section 56-5-2953(A) and its requirement the video recording "show the person being advised of his Miranda rights."

II. The circuit court erred in failing to properly consider the totality of the circumstances under section 56-5-2953(B), as well as its requirement that the video recording must comply with section 56-5-2953(A) only once it is practicable.

STATEMENT OF THE CASE

On November 3, 2015, Respondent was involved in an automobile accident. Deputy Snelgrove responded and placed Respondent under arrest for disorderly conduct based on his conduct at the scene.[1] (6/8T.35; R.46). Trooper Barnett arrived and additionally placed Respondent under arrest for DUI. (Incident Scene Roadside Video).

At trial, Respondent moved to dismiss the case arguing the video failed to comply with section 56-5-2953(A) of the South Carolina Code. After testimony and argument, the Honorable Donald B. Hocker, dismissed the charges in a verbal order. Judge Hocker prepared a written order memorializing his dismissal, finding the State failed to comply with section 56-5-2953(A)(1)(a)(iii) of the South Carolina Code. (Order dated July 25, 2016, pp.4-5; R.4-5).The Court further found the exceptions of section 56-5-2953(B) do not apply. (Order dated July 25, 2016, p.5; R.5). Prior to receiving the signed order and based on Judge Hocker's oral ruling, the State filed a Motion to Reconsider on June 9, 2016. Judge Hocker considered the motion at a hearing held on July 25, 2016. On the same date, Judge Hocker gave both parties a copy of the signed order resulting from the June hearing.

The State prematurely served a Notice of Appeal from the July 25 Order of Judge Hocker on August 4, 2016. The Notice was served and filed prior to receiving an order regarding the State's outstanding Motion to Reconsider. This Court remanded the case to the trial court for entry of an order on the Motion to Reconsider. By Order dated October 20, 2016, Judge Hocker denied the Motion to Reconsider. (Order dated October 20, 2016; R.5-11). On October 24, 2016, the State served and filed an Amended Notice of Appeal. This Brief of Appellant follows.

[1] Respondent pled guilty to disorderly conduct in Magistrate's Court. (6/8T.11; R.22).

ARGUMENT

I. The circuit court erred in dismissing this case based on an erroneous interpretation of section 56-5-2953(A) and its requirement the video recording "show the person being advised of his Miranda rights."

The circuit court erred in dismissing this case. First, the circuit court erred in its interpretation of section 56-5-2953(A) of the South Carolina Code and in requiring Respondent to be on camera at the time his Miranda rights were read to him. Further, even if the circuit court's requirement that Respondent must be seen on video during the reading of the rights is required, the court erred in dismissing the case when there is significant evidence outside of the video and an appropriate remedy would be suppression of the video.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id.

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Pittman, 373 S.C. at 561, 647 S.E.2d at 161. However, the statute must also be read as a whole and in harmony with its purpose. State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Accordingly, "[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

Section 56-5-2953 requires:

> (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 video recorded.
> (1)(a) The video recording at the incident site must:
> (i) not begin later than the activation of the officer's blue lights;
> (ii) include any field sobriety tests administered; and
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and **show the person being advised of his Miranda rights.**

S.C. Code Ann. § 56-5-2953 (A) (Supp. 2014) (emphasis added). The portion "show the person being advised of his Miranda rights" is the portion of the statute at issue in this case.

The South Carolina Supreme Court has explained: "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). The video is to **document** the procedures used and the entirety of the interaction between the person and the officer through arrest. The South Carolina Supreme Court, citing to Roberts, further opined: "Subsection (A) was intended to capture the interactions and field sobriety testing between the subject and the officer in a typical DUI traffic stop where there are no other witnesses." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461(2015). Any interpretation of the statutory language must be made in light of that intended purpose by the legislature.

It is clear the legislature's intent was to require the State to **document** the steps taken at the incident site to ensure a fair procedure was used and that the intoxicated individual's rights were not violated. Considering these underlying purposes of the statute, the State submits that the most appropriate definition of "show" is "to make apparent," see Black's Law Dictionary (10th ed. 2014), or in the alternative, "to demonstrate, reveal, or make evident." See The American Heritage Dictionary of the English Language, New College Edition 1199 (1980);

Webster's New World Dictionary of the American Language, 2nd College Edition 1319 (1976). This definition of "show" best comports with the legislative intent while still giving effect to the plain language of the statute. The video can document the reading of Miranda and provide a jury with the necessary information to know Miranda was read without giving them a view of the defendant and his reactions. It was error for the circuit court to impose a requirement Respondent be "seen" during the reading of Miranda when the statutory interpretation most consistent with the legislative intent would only require the State to "make apparent" or "demonstrate" he was read his Miranda rights.

The video recording in this case clearly demonstrates Respondent was read his Miranda rights. First, the Trooper specifically addresses Respondent upon opening the door to Deputy Snelgrove's vehicle.[2] Trooper Barnett asks Respondent to look at him and then asks him to discuss the accident. The Trooper then notes based on Respondent's response he is not willing to talk about the wreck. The Trooper then indicates there is a very strong smell of alcohol. He then reads Respondent his Miranda rights, which are clearly heard on the video recording.[3] Respondent does not respond when asked if he understood his rights, and after a moment, Trooper Barnett indicates he will take Respondent's silence as he understood his rights. Respondent is then clearly placed under arrest on the video recording and when asked if he understands, the Trooper again takes his silence as acknowledgement of his understanding. (Video Recording of Incident Scene). As Respondent's counsel agrees: "You do hear the Miranda . . . you do hear the arrest . . . ." (6/8T.7; R.18). The video recording presented by the

[2] There is absolutely no assertion by Respondent that he is not present in the back of the Deputy's vehicle. His counsel admits he is in the vehicle, agrees Miranda is given, and agrees his client is placed under arrest on the video recording. (6/8T.7; 10; 25; R.18; 21; 36).

[3] No argument has been made that the Miranda warnings were deficient in any way.

State "shows" Respondent being advised of his Miranda rights. Accordingly, the circuit court erred in dismissing the case because the State complied with section 56-5-2953(A).

Also, any defects in the videotape go to its weight rather than admissibility. See State v. Dicapua, 373 S.C. 452, 636 S.E.2d 150, 153 (Ct. App. 2007) (Stilwell, J., concurring opinion) (lack of audio on surveillance videotape of drug sting went to the weight of the evidence, not its admissibility); see also, State v. Salisbury, 330 S.C. 250, 498 S.E.2d 655, 665 (Ct. App. 1998) (conflict in testimony regarding condition of Breathalyzer machine went to weight of the test results rather than admissibility of the evidence), *aff'd as modified*, 343 S.C. 520, 541 S.E.2d 247 (2001). Defects in evidence or procedure generally do not affect admissibility. See, e.g., State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

Additionally, "[t]he legislature is presumed to intend that its statutes accomplish something." State v. Long, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005). Here, the primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence. State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011). "The statute must be interpreted with realistic circumstances and rationales in mind." Elwell, 396 S.C. at 336, 721 S.E.2d at 454; State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."). Courts will reject an interpretation of a statute leading to an absurd result clearly unintended by the legislature. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) ("However plain the ordinary meaning of the words

used in the statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature. . . .").

The circuit court's interpretation defeats the purpose of the statute and clearly ends in an absurd result in this case. Here, an individual is placed under arrest for disorderly conduct because of his behavior at the scene. Deputy Snelgrove explains to Trooper Barnett right after the Trooper arrives that Respondent is in handcuffs in his vehicle because Respondent made threats to the deputy and others. (Video of Incident Scene). Further, Deputy Snelgrove testified regarding Respondent's behavior upon the Deputy's arrival at the scene, including using profanity and having a "God complex." (6/8T.34-35; R.45-46). Instead of taking him out of the vehicle, the Trooper notes his odor of alcohol and reads him his Miranda warnings before placing him under arrest for DUI. Approximately six minutes after Respondent is placed under arrest for DUI, the Deputy has to again confront Respondent because Respondent is becoming unruly in the Deputy's vehicle. (Video of Incident Scene). The Respondent continues to express his belief he is God and use profanity.

As noted before there is no indication Respondent was not in the vehicle at the time Miranda was read and the video clearly includes the reading of Miranda rights. The video leaves no question Trooper Barnett properly advised Respondent of his Miranda rights and arrested Respondent for DUI. It would be absurd for the legislature to expect this case to be dismissed when the Trooper was acting prudently and provided a complete video from the time he arrived until the time Deputy Snelgrove transported Respondent away from the scene.

Finally, even if the video fails to comply, the appropriate remedy would be to suppress the video and allow the case to proceed on the extensive other evidence available. The South Carolina Supreme Court, in construing the statute, found where a video "is of such poor quality

that its admission is more prejudicial than probative, the remedy would not be to dismiss the DUI charge." State v. Gordon, 414 S.C. 94, 100, 777 S.E.2d 376, 379 (2015). Here, the same reasoning should apply. The State presented a video. If it captures the reading of Miranda, but based on the conditions—in this case the fact it is in the dark and the Deputy has his lights going in order to prevent his vehicle from being struck—the video fails to "show" the person as necessary for a jury to fully understand the procedure used by the Trooper, then the proper remedy should be to suppress the video and not dismiss the case as a whole. This is especially true in light of the fact that testimony can be provided by Trooper Barnett and Deputy Snelgrove, as well as other parties at the scene, including the individual whose car Respondent struck, EMS workers, and other responders. Accordingly, even if the circuit court properly found the video failed to fully "show" Respondent being advised of his Miranda rights pursuant to section 56-5-2953(A), the court erred in dismissing the case instead of suppressing the video.

II. The circuit court erred in failing to properly consider the totality of the circumstances under section 56-5-2953(B), as well as its requirement that the video recording must comply with section 56-5-2953(A) only once it is practicable.

The circuit court erred in finding subsection (B) does not apply in the instant case. Subsection (B) clearly applies because it contains an exception when the incident site is not the result of a traditional DUI traffic stop but instead involves an accident scene. Additionally, under the totality of the circumstances in this case dismissal is not warranted.

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.[4] 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

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

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:

> 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 the foregoing reasons, it is respectfully submitted the decision of the circuit court dismissing this case based on the State's failure to provide a video recording in conformity with section 56-5-2953(A) of the South Carolina Code and its refusal to consider the exceptions provided in section 56-5-2953(B) of the South Carolina Code should be reversed and this case remanded for trial in which the State should be allowed to present the video of the incident site.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

August 17, 2017

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

State of South Carolina, Appellant,

vs.

Tony Latrell Kinard, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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August 17, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County
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State of South Carolina, Appellant,

vs.

Tony Latrell Kinard, Respondent.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Final Brief of Appellant on Respondent by depositing one copy of the same in the United States mail, postage prepaid, addressed to:

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Columbia, South Carolina 29210-4487

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I further certify that all parties required by Rule to be served have been served.
This 17th day of August, 2017.

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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

State of South Carolina

Appellant,

vs.

Tony Latrell Kinard

Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The Circuit Court did not err in dismissing the case based on an erroneous interpretation of S.C. Code Ann. §56-5-2953(A) and its requirement the video recording "show the person being advised of his Miranda rights."

II. The Circuit Court did not err in failing to properly consider the totality of the circumstances under S.C. Code Ann. §56-5-2953(B), as well as its requirement that the video recording must comply with S.C. Code Ann. §56-5-2953(A) only once it is practicable.

STATEMENT OF THE CASE

On or about November 3, 2015, at approximately 6:30pm, Trooper Barnett responded to a wreck on the I-26 west-bound exit ramp at exit 74. Prior to his arrival on scene Trooper Barnett activated his in-car video camera. Newberry County Deputy Snellgrove was already on scene and had detained the Respondent by placing him in handcuffs and in the rear of his patrol vehicle. (R.p 49) The Respondent never physically appears on Trooper Burnett's at-scene video because he is handcuffed and in the rear of Trooper Snellgrove's car. (R.p 39) Deputy Snellgrove does not have any recording of this incident because his vehicle was not equipped with a video camera. (R.p 49-50) Deputy Snellgroves blue lights are flashing during the entire video making it difficult to see what is happening on the video. No field sobriety tests are conducted at the scene. The Respondent is never taken out of Deputy Snellgrove's vehicle, therefore, the arrest of the Respondent is not on the video and the Respondent is not shown being advised of his Miranda Rights. (R.p 39-42) Neither the Trooper or the Deputy submitted an affidavit of failure to provide video recording.

ARGUMENT

I. The Circuit Court did not err in dismissing the case based on an erroneous interpretation of S.C. Code Ann. §56-5-2953(A) and its requirement the video recording "show the person being advised of his Miranda rights."

The circuit court correctly dismissed this case. First, the circuit court correctly interpreted S.C. Code Ann. §56-5-2953(A) of the South Carolina Code which requires the Respondent to be on camera at the time he is arrested and read his Miranda rights. Second, the remedy for failure to comply with this statutory requirement is dismissal of the case. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (S.C. 2011); The Town of Mt. Pleasant v.

Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011); State v. Johnson, 396 S.C. 182,720 S.E.2d 516 (S.C. 2012).

The Statutory construction of this section has been litigated extensively throughout South Carolina. In constructing the terms of a statute, the primary rule of statutory construction is that a statute should be construed to give the effect to the intent of the legislature. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E. 2d 278 (2011); City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007); and State v. Johnson, 393 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011). A court should not attempt to divine the intent of the legislature when the statutory language of the statute is clear and unambiguous. Id. Thus, in interpreting a statute, a court should give words their plain and ordinary meaning, and not resort to forced construction that would limit or expand the statute in question. Id. The provision of a statute are penal in nature, the statute must be strictly construed against the State in favor of the Defendant. Id. Criminal statutes must be strictly construed against the State in favor of the defendant. State v. Castineria, 341 S.C. 619, 625-26 (Ct. App. 2000). When the terms of a statute are unclear and ambiguous the court must apply them accordingly to their literal meaning. State v. Leopard, 349 S.C. 467, 470-71 (Ct. App. 2002). Here the statute and the related case law is clear and dismissal is the appropriate remedy.

Pursuant to the provisions of S.C. Code Ann. §56-5-2953, as amended, a person charged with driving under the influence must have their conduct recorded as follows:

> S.C. Code Ann §56-5-2953: Incident site and breath test site video recording
> (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 video recorded.
> (1)(a) The video recording at the incident site must:
> (i) not begin later than the activation of the officer's blue lights;
> (ii) include any field sobriety tests administered; and

(iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights. (empasis added)

(b) A refusal to take a field sobriety test does not constitute disobeying a police command.

(2) The video recording at the breath test site must:

(a) include the entire breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test;

(b) include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test; and

(c) 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 video record this waiting period.

(3) The video recordings 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.

(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.

HISTORY: 1998 Act No. 434, Section 9; 2000 Act No. 390, Section 23; 2003 Act No. 61, Section 8; 2008 Act No. 201, Section 11, eff February 10, 2009.

At issue in this case is whether the State adequately met the requirements of showing the Respondent was properly arrested and advised of his Miranda rights on camera. The State contends that Trooper Barnett's video provides more than adequate evidence that the Respondent was clearly read his Miranda warnings as required by S.C. Code Ann. §56-5-2953. However, the Respondent is never seen on the at-scene video. In fact you can barely see Trooper Barnett, because of the flashing blue lights, reading Miranda rights while the Respondent was sitting in the back of Deputy Snelgrove's car. Respondent is not visibly present at all on the video recording at the exact time his arrested or his Miranda rights read. In construing the terms of §56-5-2953(A)(1)(a)(iii) which requires "the arrest of a person for a violation of §56-5-2930 or §56-5-2933, or a probable cause determination in that the person violated §56-5-2945, and show the person being advised of his Miranda rights," the plain and ordinary meaning of the statute is that the videotape must include the arrest of the Respondent and also show the Respondent as he is being advised of his Miranda rights.

In the case at bar, the arresting officer failed to comply with the requirements set forth in S.C. Code Ann. §56-5-2953, specifically the arresting officer did not videotape the arrest of the Respondent nor did he show the Respondent as he is being advised of his Miranda warnings and further there was no affidavit submitted to cure any defect in the case. The remedy for failure to comply with the above videotaping statute is a dismissal of the charge. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (S.C. 2011); The Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (S.C. 2011); State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (S.C. 2012).

In its common use in the English language the word "show" can take on many forms. It may be a noun as, for example, a demonstrative display such as "show strength," or as a display

arranged to arouse interest or stimulate sales, or even as a radio or television program. The word may also be verb, as in "to cause or permit to be seen" or to "display for the notice of others," or "to reveal by one's condition, nature or behavior." (Webster's Ninth New Collegiate Dictionary). In the context of the statute at issue, the word "show" is clearly used as a verb, and therefore can be interpreted as meaning, "to cause or permit to be seen." The State concedes that, " — the Respondent was not visibly present on the video recording at the exact time his Miranda Rights were read." In fact the Respondent was not visibly present at any time in the video recording presented by the State. Therefore, in the context of this statute at issue, the word "show" in the phrase, "... and show the person being advised of his Miranda rights ..." (SC Code of Laws, Section 56-5-2953(A)(1)(a)(iii) (1976 as amended)) means to cause or to permit the person being advised of his Miranda rights to be seen. This interpretation is consistent in the entire context of the statute, and with the Circuit Court cases and Appellate Cases presented by the Respondent, all of which include the requirement that the Respondent's entire body be seen in the video made during the arrest and testing process.

If the video did not properly show the Respondent as he is being read his Miranda rights, there was no alternative other than to dismiss the case; however, the State replied that the proper alternative would be to suppress the video. The Appellate courts have not required the video recording to be "perfect." The fact that a part of the video is blurred or poor quality might not be enough to cause a dismissal of the case, as for example was the situation in State v. Gordon, 414 S.C. 94 (2015). The appropriate remedy in that situation was determined to be, at worst (from the State's point of view), the suppression of the video However, in Gordon there was a video in which a person who can be clearly seen as being the Respondent was visible while undergoing field sobriety testing. In this case, all that can be seen on the video is flashing blue lights and the

silhouette of the Trooper standing at the door of the deputy's patrol car and reading Miranda rights. As stated above, the Respondent, who is said to be in the back seat of the Deputy's car, is not in any way visible.

It is clear that the purpose of the video recording provision of the statute is to create direct evidence of the arrest and testing process so as to allow the finder of fact to view that process and make an independent decision as to whether or not the advisement of Miranda rights was properly administered, acknowledged, and understood and that the testing process was properly administered and properly performed. It is also clear this video does not "cause or permit to be seen" the Respondent while he is being advised of his Miranda rights and therefore does not provide the opportunity to make such an independent decision.

Neither the Deputy nor the Trooper had offered to assist the Respondent in getting out of the car so that he could be visible on the video while being arrested and read his Miranda rights. There was testimony that the Respondent earlier had been belligerent and combative, and there was testimony that the Trooper observed the Defendant to have a, "1,000 mile stare," but there was no testimony concerning his demeanor and attitude at the time the Trooper could be seen arresting Respondent and reading him the Miranda rights advisement. The audio portion of the video recording indicates that the Respondent does not respond to the Trooper's questions concerning the Miranda rights advisement. Without being able to see the Respondent on the video it is not possible to determine if he actually heard and understood his Miranda rights. The legislative intent of the statute was that the Respondent be visible on the video recording during the whole process of a DUI arrest, including the arrest and reading of the Respondent's Miranda rights and the field sobriety tests (if any). Allowing a video recording in which only the Trooper can be seen during reading to the Respondent of his Miranda rights would lead to an

interpretation of the statute that would, "... lead to a result so plainly absurd that it would not have been intended by the Legislature or would defeat the plain legislative intention." Mt. Pleasant v. Roberts, 393 S.C. 332 at 342-343, 713 S.E. 2d 278 at 283 (2011).

Concerning the issue of the risk and or danger that might have been involved in "forcing" the Respondent out of the car so that he could be seen on video, there is no evidence in this case that, at the time the Trooper arrested the Respondent and recited the Miranda rights, the Respondent would have been uncooperative and present a threat to the law enforcement officers or to himself. Respondent was already handcuffed, had a broken leg, and was wearing a brace on his leg. There is also no indication in any report or other evidence that the Respondent gave officers any difficulty or resisted when exiting the patrol car at the county jail.

While it is certainly possible that in a similar situation there may be a Respondent that is being belligerent or uncooperative, this case is limited by the facts presented, and those facts do not shed any light on the Respondent's lack of willingness to cooperate in the proper video recording of the Miranda warning sequence. There is, in this case, no evidence that the Trooper would have had to, " — wrestle the man back to the camera before Miranda is offered" The Respondent was never even asked to exit the vehicle. Accordingly, the circuit court specifically found the video did not comply with the statutory requirements set forth pursuant to S.C. Code Ann. §56-5-2953(A) and properly dismissed the case.

II. The Circuit Court did not err in failing to properly consider the totality of the circumstances under S.C. Code Ann. §56-5-2953(B), as well as its requirement that the video recording must comply with S.C. Code Ann. §56-5-2953(A) only once it is practicable.

The circuit court did not correctly find that subsection (B) does not apply to the instant case. Although this is an accident case, because a video recording exists in this matter, Section 56-5-2953(B) does not apply. Even assuming that it did apply, and that exigent circumstances existed such that the officers believed that attempting to remove the Respondent from the back of the deputy's vehicle so that he could be fully seen on the videotape receiving his Miranda rights warning was not feasible or too dangerous, no affidavit was submitted by the officers concerning those circumstances as required by the statute. If the Trooper had submitted an affidavit this entire appeal would not be necessary. There was a remedy for the State to comply with the videotaping statute, however, the State decided not to submit an affidavit. Further, as noted above, there was no evidence to support the contention that the Respondent was in fact unruly, combative or uncooperative at the time that the Trooper arrested Respondent and read the Miranda rights.

The State cites the case State v. Henkel, 413 S.C. 9, 744, S.E. 2d 248 (2015) wherein the South Carolina Supreme Court granted the State's petition for a Writ of Certiorari to review the Court of Appeals' opinion that found that the trial court should have dismissed Defendant's DUI charge because the videotape did not comply with the statutory requirements for videotaping the Defendant's conduct at the scene of his DUI arrest. The factual situation in that case was that a vehicle had been observed driving erratically and ultimately wrecking. When police responded

to the wreck, they learned from a witness that the driver had fled from the scene. Several hours later, the driver was located and, when the police arrived, was receiving medical care in an ambulance. Then while the Defendant was in the ambulance, the arresting officer administered the Miranda rights advisement to him and conducted a field sobriety test, both of which were captured on an audio recording device, but not a video recording device. However, after later in the arrest sequence, the defendant was placed in the arresting officer's patrol vehicle. The in-car camera was faced towards him, and the officer read the defendant his Miranda rights again, all of which was recorded by the camera. The trial court denied the Defendant's motion to dismiss, recognizing that this incident was not a typical DUI stop, and that the officer's investigation began hours after the wreck. The South Carolina Court of Appeals reversed, finding that the DUI charge should have been dismissed because the videotape did not comply with statutory requirements for videotaping respondent's conduct at the time of his DUI arrest. The case was decided under the statute as in existed in January, 2008. Under the facts of the case, the Court concluded that the Miranda rights advisement was given prior to the time that video recording became practicable. In the case at hand, video recording began as soon as the Trooper arrived, which was before the Miranda rights advisement to the Respondent was conducted. Thus, the arrival of the Trooper is the time that the video recording became practicable. Once video recording becomes practicable, the video recording then must comply with Subsection (A) of the statute. ("We find the language of the exception in subsection (B) ambiguous and construe the exception to require compliance with subsection (A) when it becomes practicable to begin videotaping." Henkel, 774S.E.2d at 461). In this case, after video recording became practicable, the Miranda warnings were given but not recorded in compliance with the requirements of

Subsection (A). The statute was amended in 2009, but the amendments did not alter the requirement that once the video recording starts, full compliance with Subsection (A) is required.

In State v. Manning, 734 S.E. 2d 314, 400 S.C. 257 (2012) which was cited by the State, at the time the investigating officers arrived, the Defendant had been taken to the hospital. Therefore, there were no field sobriety tests or Miranda warnings to be given at the accident site and Subsection (A) was inapplicable because the investigating officer and the defendant were never simultaneously present at the accident site, and therefore there was nothing to record. The fact that Subsection (A) was not applicable then allowed the Court to consider the exceptions in Subsection (B). However, again, in this case, Subsection (A) is applicable because, without dispute, video recording was practicable and began as soon as the arresting officer arrived. Manning is not helpful to the State's argument concerning compliance with Subsection (A) or the ability to utilize exceptions as set forth in Subsection (B) of the statute.

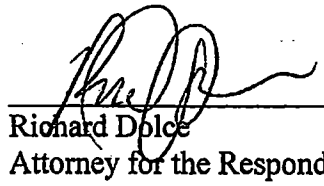
Based on the above, Section 56-5-2953(B) exceptions are not applicable in this matter, and that there is no evidence to support an argument that they would or should be. The video recording did not comply with the requirement of Section 56-5-2953 (A) that the Respondent be shown receiving his Miranda rights on the video recording that was made. The appropriate remedy, as previously set forth in the June 7, 2016 verbal order and the July 25, 2016 written order, is dismissal of the case. Accordingly, the circuit court specifically found the statutory requirements set forth pursuant to S.C. Code Ann. §56-5-2953(B) did not apply especially since no affidavit was ever filed and properly dismissed the case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the circuit court be AFFIRMED and this case DISMISSED.

Respectfully submitted,

Michael Laubshire
Attorney for the Respondent



Richard Dolce
Attorney for the Respondent

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

State of South Carolina

Appellant,

vs.

Tony Latrell Kinard

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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September 15, 2017

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

State of South Carolina

Appellant,

vs.

Tony Latrell Kinard

Respondent.

PROOF OF SERVICE

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Assistant Attorney General
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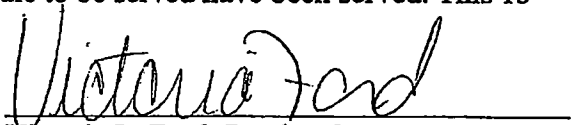
David M. Stumbo
Solicitor, Eighth Judicial Circuit

I further certify that all parties required by Rule to be served have been served. This 15th day of September, 2017.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Tony Latrell Kinard, Respondent.

Appellate Case No. 2016-001639

Appeal From Newberry County
Donald B. Hocker, Circuit Court Judge

Opinion No. 5658
Heard March 12, 2019 – Filed June 19, 2019

REVERSED AND REMANDED

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor David Matthew Stumbo, of Greenwood, for Appellant.

Michael Vincent Laubshire and Richard James Dolce, both of the Laubshire Law Firm, LLC, of Columbia, for Respondent.

LOCKEMY, C.J.: The State appeals the dismissal of a driving under the influence (DUI) charge arguing the trial court misinterpreted sections 56-5-2953(A) and (B) of the South Carolina Code (2018). We reverse the dismissal of the DUI charge against Tony Latrell Kinard and remand the case for trial.

FACTS

On November 3, 2015, at approximately 6:30 in the evening, Tony Latrell Kinard was involved in a two-car accident in Newberry County. Newberry County Deputy Jesse Snelgrove, whose vehicle was not equipped with a video camera, responded to the scene after the arrival of fire and EMS personnel. Deputy Snelgrove testified that when he arrived at the scene, he observed Kinard yelling at the EMS personnel and at a female he later found out was Kinard's girlfriend. Deputy Snelgrove testified he attempted to calm Kinard. Kinard responded by yelling and cursing at him and staring at him with his fist balled up. Deputy Snelgrove, citing concern about being assaulted, handcuffed Kinard, placed him under arrest for disorderly conduct, and put Kinard in his car. Shortly afterward, Trooper Mickey Barnett with the Highway Patrol arrived at the scene. Prior to his arrival, Trooper Barnett activated his in-car video camera. He parked his patrol car directly behind Deputy Snelgrove's car, which had its blue lights on. Deputy Snelgrove informed Trooper Barnett that Kinard's girlfriend removed bottles of alcohol from Kinard's car. Trooper Barnett testified he observed Kinard in the backseat of Deputy Snelgrove's car staring straight ahead and Kinard refused to speak to him. Trooper Barnett placed Kinard under arrest for driving under the influence, citing his demeanor and the fact he "smelled of alcohol." Trooper Barnett's video camera recorded the scene. From the video, Trooper Barnett can be heard Mirandizing Kinard, but because Kinard is inside of Deputy Snelgrove's car and he does not verbally respond to Trooper Barnett, Kinard is neither seen nor heard on the video.

Kinard's trial was set to begin on June 8, 2016, in Newberry County. Just prior to trial, Kinard made a motion to dismiss the DUI charge arguing the video failed to meet the requirements of section 56-5-2953 of the South Carolina Code (2018). The trial court heard the testimony of Deputy Snelgrove and Trooper Barnett, viewed the video of Kinard's arrest, and heard arguments from both Kinard and the State. The trial court granted Kinard's motion on the record and prepared a written order to that effect dated July 25, 2016. The State filed a motion to reconsider on June 9, 2016. The trial court held a hearing on the State's motion to reconsider on July 25, 2016, and in an order issued the same day, the trial court denied the State's motion. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. Thus, on review, the appellate court is limited to determining whether the trial judge abused

his discretion." *State v. Garris*, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct. App. 2011) (citations omitted). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." *Id.* (citations omitted).

LAW/ANALYSIS

A. Section 56-5-2953(A)

The State first argues the trial court erred in dismissing the DUI charge due to its misinterpretation of section 56-5-2953(A) of the South Carolina Code (2018). Section 56-5-2953(A) provides:

> (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 video recorded.
>
> (1)(a) The video recording at the incident site must:
>
> (i) not begin later than the activation of the officer's blue lights;
>
> (ii) include any field sobriety tests administered; and
>
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, *and show the person being advised of his Miranda rights.*
>
> . . .

(emphasis added).

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably

discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). "Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning." *Mid-State Auto Auction of Lexington, Inc.*, 324 S.C. at 69, 476 S.E.2d at 692.

Our courts examined the legislative intent of section 56-5-2953 and determined "the primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence." *State v. Elwell*, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011), *aff'd*, 403 S.C. 606, 743 S.E.2d 802 (2013). In *State v. Taylor*, 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014), we determined section 56-5-2953 serves two primary purposes. The first purpose is to create direct evidence of a DUI arrest by requiring the video include any field sobriety tests administered. *Id.* at 306, 768 S.E.2d at 77. The other purpose, which is relevant to the case at hand, is to protect the rights of the defendant by "requiring video recording of the person's arrest and of the officer issuing *Miranda* warnings." *Id.*

The State concedes Kinard is not seen or heard on the video, but rather argues the video demonstrates Trooper Barnett talking to Kinard and advising Kinard of his *Miranda* rights. Therefore, the State maintains it did not fail to meet the requirements of section 56-5-2953(A).

Section 56-5-2953(A)(1)(a) states the "video recording at the incident site must: . . . show the person being advised of his Miranda rights." The trial court interpreted the word "show" to mean "to cause or to permit the person being advised of his Miranda rights to be seen." This interpretation comports with the plain language of the statute and with the legislative purpose of protecting the rights of the defendant. In addition, section 56-5-2953(A) states a person who violates the DUI provision "must have his conduct at the incident cite . . . video recorded." Under a plain reading of the statute, a person's conduct cannot be captured from a video in which he cannot be seen.

Although South Carolina courts have not specifically addressed a situation identical to the facts of this case, our courts have dealt with similar situations. In *State v. Sawyer*, 409 S.C. 475, 763 S.E.2d 183 (2014), the supreme court considered whether a silent video meets the requirements of section 56-5-2953(A). That court found "the statute required a videotape not merely of the individual's

conduct while being read his *Miranda* and informed consent rights, but also that it 'must include' 'the reading of *Miranda* rights' and 'the person being informed that he is being videotaped, and that he has the right to refuse the test.'" *Id.* at 480, 763 S.E.2d at 185-86 (quoting S.C. Code Ann. § 56-5-2953(A)(2)(b)). Thus, the court held the silent video did not meet the requirements of section 56-5-2953(A). *Id.*

In addition, we considered a situation in which an officer moved the defendant off camera during the administration of the breath test in *State v. Johnson*, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011). The viewer could hear the breath test, but the viewer could not see defendant on the videotape. Interpreting section 56-5-2953(A), we determined "the officer violated section 56-5-2953(A)(2)(c) when he failed to capture the administration of the breath test on the videotape." *Id.* at 189, 720 S.E.2d at 520.

However, in *State v. Taylor*, 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014), we found no violation of section 56-5-2953 when the video recording of the incident briefly omitted the suspect. We based our decision on the fact the "omission does not occur during any of those events that either create direct evidence of a DUI or serve important rights of the defendant." *Id.* at 306, 768 S.E.2d at 77.

Given our understanding of the legislative intent in section 56-5-2953(A), the requirement that the arrest and *Miranda* reading be videotaped serves to protect the rights of the defendant. We agree with the trial court "[w]ithout being able to see [Kinard] on the video it is not possible to determine if he actually heard and understood his Miranda rights." Like the circumstances in *Johnson*, the officer failed to capture the arrest and *Miranda* warning on the videotape. Furthermore, in accordance with *Sawyer*, one cannot glean Kinard's conduct while being read his *Miranda* and informed consent rights from the video. Unlike the defendant in *Taylor*, this omission occurs during the event serving to protect the rights of the defendant. Accordingly, we find the trial court did not abuse its discretion in finding the video did not comply with section 56-5-2953(A).

B. Section 56-5-2953(B)

Next, the State argues the trial court erred in not finding compliance with 56-5-2953(A) was excused under section 56-5-2953(B) of the South Carolina Code (2018). Section 56-5-2953(B) provides:

> (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.

In *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011), the supreme court explained noncompliance with section 56-5-2953(A) is excused pursuant to section 56-5-2953(B):

> (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a

> sworn affidavit that it was impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accidents, and citizens' arrests; or (4) for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances.

The supreme court further clarified in *Teamer v. State*, 416 S.C. 171, 177, 786 S.E.2d 109, 112 (2016), "based on this [c]ourt's interpretation of the statute in *Roberts*, an affidavit is not needed to qualify for the third and fourth exceptions."

The trial court found section 56-5-2953(B) generally did not apply to this case because a video recording exists. The trial court presumably focused on the fact that the officer did not fail to "produce the video." However, this reading does not comport with the legislative intent of the statute. As we stated previously, "[t]he primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Mid-State Auto Auction of Lexington, Inc.*, 324 S.C. at 69, 476 S.E.2d at 692. "The statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 334, 592 S.E.2d 335, 339 (Ct. App. 2004). Furthermore, "[i]n construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature." *Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008).

As we previously mentioned, the legislature intended for section 56-5-2953 to require the State to video important events in the process of collecting DUI evidence. Reading the statute as a whole, we note section 56-5-2953(B) states: "Failure by the arresting officer to produce the video recording *required by this section* . . . ." (emphasis added). As the supreme court noted in *Town of Mount Pleasant,* the legislature intended subsection (B) to excuse noncompliance with subsection (A) in certain situations. 393 S.C. at 346, 713 S.E.2d at 285 (stating "[s]ubsection (B) of section 56–5–2953 outlines several statutory exceptions that excuse noncompliance with the mandatory videotaping requirements."). A reading to the contrary would incentivize law enforcement not to produce videos in questionable cases, which is contrary to the purpose of this statute. Moreover, although we have not addressed this specifically, in cases like *Johnson*, 396 S.C. at

182, 720 S.E.2d at 516, cited above, we analyzed the applicability of 56-5-2953(B) before dismissing the case. Thus, we hold the trial court erred as a matter of law in finding 56-5-2953(B) inapplicable.

The State argues because this case involves an accident scene rather than a traditional DUI traffic stop, it qualifies for the third exception under 56-5-2953(B) and therefore, conformity with the statute must only begin as soon as practicable. Initially, the fact that Trooper Barnett started the video upon his arrival at the scene strongly supports a finding it was practicable at that time. The State relies on *State v. Henkel*, 413 S.C. 9, 774 S.E.2d 458 (2015) to support its argument that section 56-5-2953(B) applies to this case. Similar to this case, *Henkel* involved a car accident. *Id.* The defendant, Henkel, left the scene of the accident and law enforcement found him several hours later. *Id.* When the officer arrived, Henkel was receiving medical treatment in the back of an ambulance. *Id.* At that point, the officer read Henkel his *Miranda* rights and performed a field sobriety test on him while he was in the ambulance and out of view of the camera. *Id.* Later, while on camera, the officer read him his *Miranda* rights again. *Id.* The issue was whether the requirements of section 56-5-2953(A) were met. *Id.* The court determined section 56-5-2953(B) applied and the first reading of *Miranda* occurred prior to the time video recording became practicable because Henkel was in the back of an ambulance receiving medical treatment. *Id.* at 15-16, 774 S.E.2d at 462.

This case also involves an accident. However, the accident is not the reason Kinard could not be videotaped. Deputy Snelgrove testified Kinard was yelling at multiple individuals and was not cooperating with EMS workers when he arrived at the scene. When Deputy Snelgrove attempted to calm him down, Kinard yelled profanities at him and "squared off" at him twice, once with a balled up fist. Kinard's behavior lead to Deputy Snelgrove putting him in handcuffs, placing him under arrest for disorderly conduct, and putting him in his car. Deputy Snelgrove apprised Trooper Barnett of Kinard's behavior. Trooper Barnett decided not to attempt to remove Kinard from Deputy Snelgrove's car based on Kinard's prior behavior and refusal to respond to him. Thus, similar to *Henkel*, it was impractical to remove Kinard from the car to capture him on the video. However, unlike *Henkel*, the practicality of videoing Kinard's conduct was not due to the accident, but Kinard's own conduct. Therefore, based on the totality of the circumstances, we find the failure to video Kinard while Trooper Barnett read him his *Miranda* rights qualifies under the fourth exception under section 56-5-2953(B).

CONCLUSION

The trial court correctly found the State did not comply with section 56-5-2953(A) when it failed to show Kinard during the reading of *Miranda*. However, the trial court abused discretion in finding section 56-5-2953(B) inapplicable. Based on the totality of the circumstances, the State's failure to comply with section 56-5-2953(A) is excused under 56-5-2953(B). The dismissal of the DUI charge against Kinard is

REVERSED and REMANDED.

SHORT and MCDONALD, JJ., concur.

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

State of South Carolina, Appellant,

vs.

Tony Latrell Kinard, Respondent.

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. This Court misapprehended or overlooked the clear legislative intent and misinterpreted the statute to fulfill that legislative intent. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the State presented a proper video in compliance with section 56-5-2953(A), and remand for a new trial.

In this case, the Court was asked to interpret the requirement of the statute that the video recording at the incident site must include the arrest of a person and "show the person being advised of his Miranda rights." S.C. Code Ann. § 56-5-2953(A)(1)(a)(iii) (Supp. 2014). The only word at issue is "show" and exactly what must be shown on the video in order to be in compliance.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). "The statute must be interpreted with **realistic circumstances and rationales in mind.**" State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011)(emphasis added); State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."). Courts will reject an interpretation of a statute leading to an absurd result clearly unintended by the legislature. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) ("However plain the ordinary meaning of the words used in the statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature. . . .").

This Court correctly explained the policy and legislative intent behind the statute. As this Court previously stated: "[T]he primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence." Elwell, 396 S.C. at 336, 721 S.E.2d at 454. The South Carolina Supreme Court has explained: "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). With these interest in mind, the Court, however, misinterpreted the language of the statute and created a requirement with an absurd result.

This Court found the requirement of the statute that the video must "show the person being advised of his Miranda rights" means it must show the person **as** he is being advised of his Miranda rights. This is not the requirement of the statute. This Court, like the trial court, interpreted the statute to require the person be on camera at the time of the reading of Miranda rights. However, the statute does not require the person be shown as he is being read Miranda it requires the video to show him being advised. This can be accomplished, as it was in this case, without the person being on camera.

Further, not requiring him to be on camera, but requiring a video that shows the advisement, is entirely consistent with the legislative intention behind the statute. The video is to **document** or **demonstrate** the procedures used and the entirety of the interaction between the person and the officer through arrest. The video is to **document** the stop, **document** any field sobriety tests the Trooper administered, and **document** the arrest including the reading of Miranda warnings. As the South Carolina Supreme Court, citing to Roberts, further opined: "Subsection (A) was intended to capture the interactions and field sobriety testing between the subject and the officer in a typical DUI traffic stop where there are no other witnesses." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461(2015).

It is clear the legislature's intent was to require the State to **document** or **demonstrate** the steps taken at the incident site to ensure a fair procedure was used and that the intoxicated individual's rights were not violated. Considering these underlying purposes of the statute, the State submits that the most appropriate definition of "show" is "to make apparent," see Black's Law Dictionary (10th ed. 2014), or in the alternative, "to demonstrate, reveal, or make evident." See The American Heritage Dictionary of the English Language, New College Edition 1199 (1980); Webster's New World Dictionary of the American Language, 2nd College Edition 1319

(1976). This definition of "show" best comports with the legislative intent while still giving effect to the plain language of the statute. The video can document the reading of Miranda and provide a jury with the necessary information to know Miranda was read without giving them a view of the defendant and his reactions. It was error for the circuit court to impose a requirement Respondent be "seen" during the reading of Miranda when the statutory interpretation most consistent with the legislative intent would only require the State to "make apparent" or "demonstrate" he was read his Miranda rights.

The video recording in this case clearly demonstrates Respondent was read his Miranda rights. First, the Trooper specifically addresses Respondent upon opening the door to Deputy Snelgrove's vehicle.[1] Trooper Barnett asks Respondent to look at him and then asks him to discuss the accident. The Trooper then notes based on Respondent's response he is not willing to talk about the wreck. The Trooper then indicates there is a very strong smell of alcohol. He then reads Respondent his Miranda rights, which are clearly heard on the video recording.[2] Respondent does not respond when asked if he understood his rights, and after a moment, Trooper Barnett indicates he will take Respondent's silence as he understood his rights. Respondent is then clearly placed under arrest on the video recording and when asked if he understands, the Trooper again takes his silence as acknowledgement of his understanding. (Video Recording of Incident Scene). As Respondent's counsel agrees: "You do hear the Miranda . . . you do hear the arrest . . . ." (6/8T.7; R.18). The video recording presented by the State "shows" Respondent being advised of his Miranda rights. It does not show him **as** he is being advised, but that is not what the statute requires.

---

[1] There is absolutely no assertion by Respondent that he is not present in the back of the Deputy's vehicle. His counsel admits he is in the vehicle, agrees Miranda is given, and agrees his client is placed under arrest on the video recording. (6/8T.7; 10; 25; R.18; 21; 36).

[2] No argument has been made that the Miranda warnings were deficient in any way.

This Court's interpretation defeats the purpose of the statute and clearly ends in an absurd result in this case. Here, an individual is placed under arrest for disorderly conduct because of his behavior at the scene. Deputy Snelgrove explains to Trooper Barnett right after the Trooper arrives that Respondent is in handcuffs in his vehicle because Respondent made threats to the deputy and others. (Video of Incident Scene). Further, Deputy Snelgrove testified regarding Respondent's behavior upon the Deputy's arrival at the scene, including using profanity and having a "God complex." (6/8T.34-35; R.45-46). Instead of taking him out of the vehicle, the Trooper notes his odor of alcohol and reads him his Miranda warnings before placing him under arrest for DUI. Approximately six minutes after Respondent is placed under arrest for DUI, the Deputy has to again confront Respondent because Respondent is becoming unruly in the Deputy's vehicle. (Video of Incident Scene). The Respondent continues to express his belief he is God and use profanity.

As noted before there is no indication Respondent was not in the vehicle at the time Miranda was read and the video clearly includes the reading of Miranda rights. The video leaves no question Trooper Barnett properly advised Respondent of his Miranda rights and arrested Respondent for DUI. If the primary legislative intent, as explained by the South Carolina Supreme Court, is to document the stop to provide direct evidence of what occurred, having Respondent on camera at the time he is advised of his Miranda rights provides no additional evidence. Nothing will be learned by having his face on camera. Instead, the important part of an advisement of Miranda rights is the fact the officer provides a complete and correct advisement, which is clearly **demonstrated** by the video. It leads to an absurd result to find the State failed to satisfy the legislative intent of the statute because the trooper did not have Respondent on camera when that would have added nothing of evidentiary value.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the trial court incorrectly interpreted the definition of "show" in section 56-5-2953(A)(1)(a)(iii), find the proper interpretation is to "document" or "demonstrate" as would be consistent with the legislative purpose behind the statute, and reverse and remand for a new trial.[3]

Respectfully submitted,

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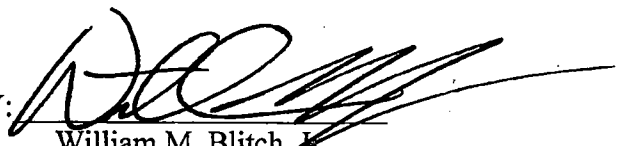
BY: 
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ATTORNEYS FOR APPELLANT

July 2, 2019

[3] The State completely agrees with this Court's analysis that even if the State failed to provide a proper video under subsection (A) of the statute, the case was improperly dismissed based on the totality of the circumstances under subsection (B).

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

State of South Carolina, Appellant,

vs.

Tony Latrell Kinard, Respondent.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within 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 2nd day of July, 2019.

SALLY ELLISON
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ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUL 02 2019
SC Court of Appeals

July 2, 2019

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 Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

William M. Blitch, 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)

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

State of South Carolina

Appellant,

vs.

Tony Latrell Kinard

Respondent.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

On or about June 19, 2019, this Court reversed the trial court's decision dismissing the Respondent's Driving Under the Influence charge and remanded the case for a new trial. In the aforementioned court order, this court had correctly affirmed the trial court's determination that the Petitioner failed to provide a proper video under S.C. Code Ann. §56-5-2953(A). This Court applied the clear legislative intent and properly applied the law to the facts of this case and reached the proper result that the Petitioner had failed to comply with S.C. Code Ann. §56-5-2953(A)(1)(a)(iii) that requires the incident site video must include the arrest of the person and must "show" the person being advised of his Miranda rights. No part of this Court's opinion, interpretation, and analysis of S.C. Code Ann. §56-5-2953(A)(1)(a)(iii) has been overlooked or misapprehended by the Court.

Further, the provisions of S.C. Code Ann. §56-5-2953, are penal in nature and therefore must be strictly construed against the State and in favor of the Respondent. Town of Mt. Pleasant v. Roberts, 713 S.E. 2d 278, 393 S.C. 332 (2011); State v. Johnson, 720 S.E 2d 516, 393 S.C. 182 (Ct App. 2011). If the language of a statute is unambiguous and conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the court has no right to impose a different meaning. Town of Mt. Pleasant v. Roberts, 713 S.E. 2d 278, 393 S.C. 332 (2011); State v. Johnson, 720 S.E 2d 516, 393 S.C. 182 (Ct App. 2011). In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute. Town of Mt. Pleasant v. Roberts, 713 S.E. 2d 278, 393 S.C. 332 (2011); State v. Johnson, 720 S.E 2d 516, 393 S.C. 182 (Ct App. 2011). Therefore, according to Rule 221(a) South Carolina Appellate Court Rules the Court should deny this petition for rehearing on this issue.

In this case, the Court was asked to interpret S.C. Code Ann. §56-5-2953(A)(1)(a)(iii) that requires and specifically states that the incident site video must include the arrest of the person and must show the person being advised of his Miranda rights. In its opinion this Court correctly explained the policy and legislative intent of this statute. The Court correctly found the requirement of the statute that the video must show the person being advised of his Miranda rights was not met by the Petitioner. Petitioner's failure to produce videotape as required by the statute is grounds for dismissal, if no exceptions apply. The City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (2007). Further, in Suchenski, the South Carolina Supreme Court has held that State v. Huntley, 349 S.C. 1 (2002) does not apply to Section 56-5-2953. Huntley held that in order for a dismissal for a statutory violation there must be a showing that the violation was prejudicial to the defendant. The Court in Suchenski distinguished Huntley because Section

56-5-2953specifically provides for the remedy of dismissal.

The States argument that S.C. Code Ann. §56-5-2953(A)(1)(a)(iii) that requires the incident site video must include the arrest of the person and must "show the person being advised of his Miranda rights" does not require the person be "shown" on video as he is being read Miranda is inconsistent with the plain reading of the statute and absurd.

Trooper Barnett never asks the Respondent to exit the vehicle so that Respondent could be shown on video as required by law. Trooper Barnett made no attempt to remove Respondent from the vehicle so that Respondent could be shown on video as required by law. There is no evidence in the record that Respondent made or presented any aggressive behavior toward Trooper Barnett.

The Respondent has a right to have his conduct videotaped, any field sobriety tests videotaped, and show his arrest and the reading of Miranda. This did not occur and this Court has correctly found Petitioner has failed to properly videotape the Respondent being advised of his Miranda rights as required by S.C. Code Ann. §56-5-2953(A)(1)(a)(iii) which requires the incident site video must include the arrest of the person and must show the person being advised of his Miranda rights.

CONCLUSION

For the foregoing reasons, the Respondent requests the panel deny the Petitioner's petition for rehearing, and find the trial court and this Court correctly interpreted the definition of "show" in S.C. Code Ann. §56-5-2953(A)(1)(a)(iii) that requires the incident site video must include the arrest of the person and must show the person being advised of his Miranda rights.

July 12, 2019

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ATTORNEY FOR RESPONDENT

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

State of South Carolina

Appellant,

vs.

Tony Latrell Kinard

Respondent.

PROOF OF SERVICE

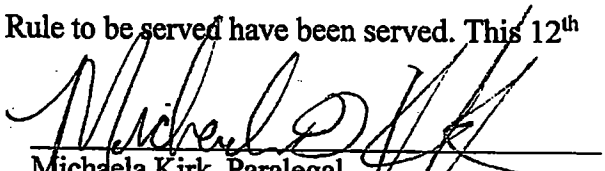
I, Michaela Kirk, certify that I have served the within Petition for Rehearing on the Appellant by depositing three copies of the same in the United States mail, postage prepaid, addressed to:

Alan Wilson
Attorney General

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

David M. Stumbo
Solicitor, Eighth Judicial Circuit

I further certify that all parties required by Rule to be served have been served. This 12th day of July, 2019.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
JUN 28 2019
SC Court of Appeals

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

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

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ATTORNEYS FOR RESPONDENT

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

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. Blitch, Jr.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

David M. Stumbo
Solicitor, Eighth Judicial Circuit

I further certify that all parties required by Rule to be served have been served. This 27th day of June, 2019.

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June 28, 2019

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 Rehearsing 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. Blitch, Jr., Assistant Attorney General
David M. Stumbo, Solicitor, Eighth Judicial Circuit

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

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:

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[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,

ALAN WILSON
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WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

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ATTORNEYS FOR APPELLANT

July 9, 2019

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

State of South Carolina, Appellant,

vs.

Tony Latrell Kinard, Respondent.

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
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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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The South Carolina Court of Appeals

The State, Appellant,

v.

Tony Latrell Kinard, Respondent.

Appellate Case No. 2016-001639

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.

C.J.

J.

J.

Columbia, South Carolina

cc:
David Matthew Stumbo, Esquire
Alan McCrory Wilson, Esquire
Michael Vincent Laubshire, Esquire
William M. Blitch, Jr., Esquire

FILED
August 30, 2019

Richard James Dolce, Esquire
The Honorable Donald B. Hocker