

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SEP 24 2019

Appeal from Newberry County General Sessions
Honorable Donald B. Hocker, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case Tracking No. 2016-001639

State of South Carolina,

Respondent,

vs.

Tony Latrell Kinard,

Defendant.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Defendant certifies that the Petition for Rehearing was made to Court of Appeals on July 2, 2019 and that this Petition was denied on August 22, 2019 Respondent received notice on August 26, 2019.

QUESTIONS PRESENTED

Did the Court of Appeals err in finding that the “totality of the circumstances” excused the State’s noncompliance with the videotaping requirement?

STATEMENT OF THE CASE

On or about November 3, 2015, at approximately 6:30 p.m., 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. The Respondent never physically appears on Trooper Barnett'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 Snellgrove's 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. Neither the Trooper nor the Deputy submitted an affidavit of failure to provide video recording.

ARGUMENT

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 its finding of facts are supported by evidence. The Court of Appeals erred in finding that the totality of the circumstances exception under S.C. Code Ann. § 56-5-2953(B) applies to this case. The circuit court correctly found that subsection (B) does not apply to the instance 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. The Court of Appeals 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.

In support of its position, the State cited 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 Appeal's 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 his 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 it 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 construes 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 Defendant 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.

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. 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.

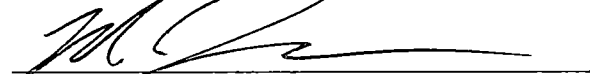
In its opinion, the Court of Appeals did not find that the trial court's finding of fact concerning the applicability of §56-5-2953(B) in this case was erroneous or unsupported by the evidence, but rather "found" a new set of facts to support the application of §56-5-2953(B) under the totality of the 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.

CONCLUSION

Based upon the above-mentioned argument, the Defendant prays for an Order granting the Respondent's Petition for a Writ of Certiorari.

September 24, 2019

Respectfully submitted,



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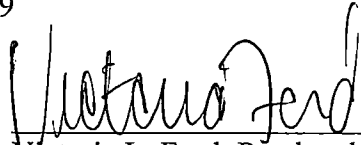
Tony Latrell Kinard

Defendant.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the Defendant's Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, Postage prepaid, on the 24th day of September 2019, addressed to the attorney for the Respondent as follows:

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