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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2013-002169

THE STATE,

Respondent,

v.

PATRICK GILLIS McALLISTER,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court properly refused Appellant's motion to dismiss based on purported noncompliance with the videotaping provisions of S.C. Code § 56-5-2953.

STATEMENT OF THE CASE

Appellant was charged while driving under the influence of alcohol, second or subsequent offense. Appellant waived his right to a jury trial, and proceeded to a bench trial before the Honorable J. Derham Cole. Appellant was sentenced to 1 year of confinement and \$5,100.00, suspended upon the completion of 15 days of confinement, to be served on weekends, and payment of \$1600,00 to probation for 3 years.

STATEMENT OF FACTS

William Branch telephoned 911 on October 3, 2012. When Branch went into his house around 5:45 or 6:00 pm, no vehicles were in the drive. (R. p. 18, lines 19-25.) Branch went out to finish his evening chores about 15 minutes later and looked down the road as deer would often cross there. (R. p. 19, lines 2-3; p. 20, line 20 – p. 21, line 19.) This time, Branch observed a pickup truck in the gravel driveway with its door open. (R. p. 19, lines 2-5.) As he observed the truck, the driver, later determined to be Appellant, fell out of the open door. (R. p. 19, lines 6-8; p. 21 line 20 – p. 22, line 6.) Branch drove his golf cart to where the man lay face down. When Appellant did not respond to him, Branch called 911. (R. p. 19, lines 17-20.) After Branch called for help, Appellant did get up and leaned against the truck. (R. p. 19, lines 20-23; p. 22, lines 11-20.) Branch noticed the truck was still running and removed the keys from the ignition, pocketing them so as to prevent the disoriented driver from leaving the scene. (R. p. 20, lines 1-2; p. 22, lines 20-21; p. 25, lines 15-18.)

Deputy Jonathan Osborne responded to the scene. Unlike a typical traffic stop, there is no evidence that blue lights were activated as Osborne responded to the scene. Osborne activated his dashboard camera upon arriving with his body mike. (R. p. 30, lines 20-22; p. 31, lines 14-19.) Osborne approached the residence on a long gravel driveway. (R. p. 13, lines 2-3.) As Osborne entered the driveway, a golf cart was visible to the left hand side of a pickup truck parked in the drive. (State's Exhibit 1, video.) The golf cart faced the approaching police car, and the truck faced the opposite direction. (State's Exhibit 1, video.) The driveway was abutted on the right hand side by a drainage ditch and a drop off on the left hand side. (State's Exhibit 1, video.) Osborne stopped behind the green Toyota pickup parked in the center of the driveway. (R. p. 13, lines 3-6;

p. 41, lines 2-3.) Branch sat in the front seat of a golf cart to the left-hand side of the pickup. (R. p. 13, lines 6-15; p. 23, lines 4-5.) By the time Osborne arrived, Appellant was seated on the back seat of the golf cart. (R. p. 13, lines 15-16; p. 23, lines 10-11.) Osborne explained that he was unable to park such that the men were visible on his video camera because the driveway was a narrow single lane with ditches on each side. (R. p. 13, line 21 – p. 14, line 2.)

Osborne's initial interactions with Appellant occurred outside the visible frame of the video but were captured on audio. Upon approaching, Osborne noticed a bleeding laceration on Appellant's chin and blood on his face and hands. (R. p. 14, lines 5-9; p. 23, lines 11-15.) Osborne requested EMS assistance as the injury appeared to require medical attention. (R. p. 14, lines 7-10; p. 14, line 23 – p. 15, line 2.) Osborne was advised that Appellant had been lying on the ground beside the pickup truck. (R. p. 15, lines 11-14.) Based on his own prior EMS experience, Osborne did not want to move Appellant until he could ascertain the full extent of his injuries. (R. p. 14, lines 11-22; p. 15, lines 10-16; p. 24, lines 11-14.) Osborne asked Appellant if he had been fighting, and Appellant responded that he had fallen when he got out of his car. (State's Exhibit 1, video.) Appellant informed Osborne that he lived in Roebuck and had been visiting a friend in Rock Hill. (State's Exhibit 1, video.) Appellant denied drinking and reported taking his medication, Paxil, around 8:00 am. (State's Exhibit 1, video.) Appellant told Osborne he arrived at the location while trying to find a friend's house. Osborne asked Appellant not to move as he went to the truck to run the plates and driver's license. While walking around the truck, Osborne observed an open container of beer in the cab. (State's Exhibit 1, video; R. p. 28, lines 5-9.) Though Appellant denied drinking, Osborne smelled

alcohol. (R. p. 24, lines 6-11.) Appellant admitted that he had driven the truck to its present location. (R. p. 25, lines 11-12.)

Approximately 9:00 minutes into the video, Osborne can be heard telling Appellant to “have a seat.” (State’s Exhibit 1, video.) Thereafter, as Osborne spoke with Branch, Appellant “began starting to move around quite a bit and then he stood up.” (R. p. 15, lines 16-18; p. 24, lines 15-20.) After Appellant stood on his own, Osborne’s concerns for his condition lessened. (R. p. 15, lines 19-20; p. 24, lines 20-21.) At that point, Osborne moved Appellant to the back of the truck where he was visible in the video frame. (R. p. 15, line 21 – p. 16, line 2; p. 24, line 21 – p. 25, line 1.) Appellant staggered into frame at approximately 12:50 into the recording. (State’s Exhibit 1, video.) Osborne then backed his car up a distance in order to widen the visible frame somewhat. The golf cart was still outside of frame when Osborne backed up. (State’s Exhibit 1, video.)

Osborne awaited EMS evaluation before attempting field sobriety tests. (R. p. 16, lines 3-9.) Appellant informed the paramedic that he was from Charleston and admitted consuming two drinks. (State’s Exhibit 1, video) Paramedics cleaned blood, checked vital signs, and bandaged Appellant’s chin. (State’s Exhibit 1, video.) After Appellant was cleared by EMS and based on his judgment that Appellant appeared to be impaired, Osborne decided to offer field sobriety tests. (R. p. 25, line 19 – p. 44, line 14; State’s Exhibit 1, video, approx.. 29:10.) Appellant admitted consuming two beers. Appellant had trouble relating what type of beer he consumed. (State’s Exhibit 1, video.) Appellant claimed to be visiting a friend in Rock Hill and admitted driving to the location. (State’s Exhibit 1, video.) Appellant initially had difficulty standing in front of Osborne, but eventually managed to stand facing him. (State’s Exhibit 1, video.) Osborne asked

Appellant to focus on his finger in order to perform the horizontal gaze nystagmus test. (R. p. 26, lines 14-18; State's Exhibit 1, video.) Appellant was "grossly intoxicated" and fell toward the truck, unable to perform the requested function. (R. p. 16, lines 7-14; p. 26, lines 18-22; State's Exhibit 1, video.) At that point, Appellant was placed under arrest, and Miranda rights were read. (R. p. 26, lines 22-23; State's Exhibit 1, video, 32:20-33:50.)

Following arrest, Appellant was transported to the Moss Justice Center where he was offered a DataMaster breath test, and Appellant refused the test. (R. p. 28, line 12-p. 49, line 19.)

ARGUMENT

I.

The trial court properly refused Appellant's motion to dismiss based on purported noncompliance with the videotaping provisions of S.C. Code § 56-5-2953.

In criminal cases, the appellate court sits to review errors of law only; thus an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006).

"The purpose of S.C. Code Ann. § 56-5-2953 is to create direct evidence of a DUI arrest." State v. Gordon, Op. No. 5226 (S.C. Ct. App. filed April 23, 2014) (Shearouse Adv. Sh. No. 16. At 76). S.C. Code Ann. § 56-5-2953(A)(1)(a) reads:

(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.

In the present case, there is no question that the video complies with S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii-iii). The video complied with S.C. Code Ann. § 56-5-2953(A)(1)(a)(ii), completely showing Appellant's conduct during the attempted field sobriety test. (State's Exhibit 1, video, 29:15 – 32:20.) The video also complied with S.C. Code Ann. § 56-5-2953(A)(1)(a)(iii), showing Appellant's conduct during his arrest and

recitation of Miranda rights. (R. p. 26, lines 22-23; State's Exhibit 1, video, 32:20-33:50.) The issue on appeal arises from Appellant's contention that S.C. Code Ann. § 56-5-2953(A)(1)(a)(i) requires that the defendant's physical conduct be completely visible from the moment of initiation.

In the present case, with regard to S.C. Code Ann. § 56-5-2953(A)(1)(a)(i), there is no indication that blue lights were ever activated. Osborne testified, "Pretty sure I didn't even activate blue lights period. I never activated blue lights. The camera was activated from my body mike." (R. p. 31, lines 17-19.) Unlike a traditional traffic stop for DUI, Osborne responded to a dispatch regarding a man lying face down in a stranger's driveway. Fortunately, Osborne did turn on his camera the moment he arrived, and the entire videotape was provided. While Appellant is not immediately physically visible in the videotape, audio can be heard. During this portion of the tape, Osborne begins to suspect DUI and continues to evaluate Appellant's medical condition.

This case is analogous to State v. Henkel, 404 S.C. 626, 746 S.E.2d 347 (Ct. App. 2013). In Henkel, 404 S.C. 626, the officer never activated blue lights, and the trial court found that the officer activated his patrol car video as soon as practicable. However, in contrast to Henkel, in the present case, Osborne captured completely field sobriety tests and Miranda warnings. Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011) is also instructive. While Murphy was decided under S.C. Code Ann. § 56-5-2953 which did not require taping of field sobriety tests, the portion applicable to this case, that taping is required upon initiation of blue lights, remains essentially the same. In Murphy, 392 S.C. 626, the Court of Appeals noted, "nothing in the plain language of the statute

requires [the defendant] remain in full view of the camera for the duration of the encounter.” Murphy, 392 S.C. 626.¹

The State further submits that, if the video does not adequately conform to the requirements of S.C. Code Ann. § 56-5-2953(A)(1)(a)(i) the noncompliance is excused because (1) it is accompanied by a sworn affidavit indicating the defendant needed medical treatment and (2) under the totality of the circumstances. As summarized in State v. Manning, 400 S.C. 257, 264-265, 734 S.E.2d 314, 317 - 318 (Ct. App. 2012), reh'g denied (Nov. 30, 2012),:

Subsection B of 56–5–2953 outlines four exceptions that excuse noncompliance with subsection A's mandatory video recording requirement. Failure to comply with the video recording requirement is excused: (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 video recording because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed*, (3) in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's arrests; or (4) *for any other valid reason for the failure to produce the video recording based upon the totality of the circumstances*

[Emphasis supplied.] S.C. Code Ann. § 56-5-2953 provides also specifically provides:

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.

¹ In Murphy, 392 S C 626, the defendant was only partially visible during field sobriety tests Murphy, 392 S C 626 noted that the statute in effect at the time did not expressly require recording of field sobriety tests, only conduct at the incident site In Gordon, *supra*, this court found that the head not being visible during administration of the HGN test the head must be visible as the statute now requires recording of field sobriety tests Here, because it is unquestioned that the field sobriety tests and rights advice are captured as required, Murphy is still instructive

Here, Osborne submitted an affidavit noting Appellant's medical condition when Osborne arrived. Appellant had been found unresponsive on the ground, and he was visibly bleeding from the chin. Osborne, a former EMT himself, felt it safest not to move Appellant immediately until he could better assess Appellant's medical condition. Only upon several minutes' observation and after Appellant began moving on his own did Osborne determine that Appellant's condition was in fact such that he could be moved into the video frame without danger. Therefore, due to Appellant's perceived need for medical care, as documented by Osborne's affidavit, the fact that Appellant's conduct is only videotaped inasmuch as audio can be heard is excusable pursuant to S.C. Code Ann. § 56-5-2953(B).

Any shortcoming in the video of Appellant's conduct is also excusable under the totality of the circumstances. The present case is somewhat unique in that the officer does not have the opportunity to observe and record the defendant driving. Henkel, 404 S.C. 626; See also Manning, 400 S.C. 257 (Lack of video recording excusable under totality of circumstances where officer conducting accident investigation was not on site at same time as defendant who was later arrested at hospital). Osborne would not have known he was dealing with a DUI until he spoke with Appellant, observed his disorientation, smelled alcohol, and determined evidence supported that Appellant had been driving the vehicle when it came to rest. In addition to this evaluation of whether a DUI was suspected and Appellant's medical condition, it is also important to note that the driveway was abutted by a ditch one side and a drop off on the other. Osborne did not feel comfortable maneuvering his car into position such that Appellant physically appeared on camera due to these obstacles. Appellant's voice appears in audio during the

early part of the tape; therefore his conduct is not completely undocumented. Further, once Appellant was moved into view, the video shows a substantial amount of Appellant's conduct.² S.C. Code Ann. § 56-5-2953's requirement for video cameras installed in law enforcement vehicles clearly subjects the videotaping requirements to what is possible to capture from such equipment under the totality of the circumstances. Here, there were several valid reasons why a portion of Appellant's physical conduct was not recorded such that the trial court properly found S.C. Code Ann. § 56-5-2953 did not require dismissal of Appellant's charges.

Appellant further argues that an affidavit should not be considered unless a video was not produced at all. S.C. Code Ann. § 56-5-2953(B) states, "Failure by the arresting officer to produce the video recording *required by this section* is not alone ground for dismissal... ." [Emphasis supplied.] The clear language of the statute is such that it is permissible for a court to consider an affidavit when a video fails to meet the requirements, not just when a video does not exist. See for example State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008)("In interpreting statutes, we look to the plain meaning of the statute and the intent of the Legislature.").

Finally, to dismiss the instant case due to Appellant's conduct not being physically visible immediately upon Osborne's arrival yields an absurd result. That the video taken on scene only provides audio of Appellant's conduct during the initial encounter is much like the situation when an automobile is initially stopped. A typical dashboard video following a traffic stop would at first only record the operation of the vehicle and the verbal exchange between the officer and driver. Could a driver argue that

² Appellant grasped the truck for balance as he moved into the frame, informed EMS he had two drinks, took over a minute to ponder what type of beer he had before finally answering "barley," and had difficulty standing to begin sobriety tests

because his body was not visible, the case should be dismissed because his “conduct” did not appear on the videotape? For example, a potential defendant could argue that he was not visible to the camera when he is pulled over until asked to step out of his vehicle.³ Alternatively, to apply the standard suggested by Appellant, a defendant could merely step away from the front of an officer’s car in order to assure that his conduct prior to sobriety tests and Miranda warnings was not recorded, thereby eluding DUI conviction. Moreover, an officer cautiously approaching a citizen’s medical condition and his own safety before assuring the defendant’s body is in full view of the dashboard camera is to be encouraged. Appellant essentially argues that a video must at all times, even before sobriety tests or warnings or administered, perfectly capture the defendant’s physical presence in frame. Undoubtedly, this was not the desired result of the statute.

³ Interestingly, an example of this is provided in the tape in the present case. While transporting Appellant to Moss Justice Center, Osborne initiates a traffic stop on another vehicle due to suspicion of DUI. At no point is the driver visible, even once the vehicle is stopped. The operation of the vehicle is shown and Osborne’s conversation with the driver is captured, but the driver himself is not visible.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this 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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