

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  
Appellate Case No. 2019-001604

**RECEIVED**

OCT 01 2019

S.C. SUPREME COURT

State of South Carolina,

Petitioner-Respondent,

v.

Tony Latrell Kinard,

Respondent-Petitioner.

Opinion No. 5658 (S.C. Ct. App. filed June 19, 2019)

**STATE'S RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS**

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## STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals properly concluded the trial court erred in failing to consider the totality of circumstances under section 56-5-2953(B) and correctly reversed the trial court's dismissal and remanded the case for trial.

## STATEMENT OF THE CASE

### Procedural History

On November 3, 2015, Tony Kinard was involved in an automobile accident. Deputy Snelgrove responded and placed Kinard under arrest for disorderly conduct based on his conduct at the scene.<sup>1</sup> (6/8T.35; App.48). Trooper Barnett arrived and additionally placed Kinard under arrest for DUI. (Incident Scene Roadside Video).

At trial, Kinard 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; App.6-7). The Court further found the exceptions of section 56-5-2953(B) do not apply. (Order dated July 25, 2016, p.5; App.7). 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; App.7-13). On October 24, 2016, the State served and filed an Amended Notice of Appeal.

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<sup>1</sup> Kinard pled guilty to disorderly conduct in Magistrate's Court. (6/8T.11; App.24).

The South Carolina Court of Appeals issued an opinion in which it ultimately reversed and remanded the case for a new trial. The Court affirmed the trial court's interpretation of section 56-5-2953(A) and found the State failed to present a proper complying video. However, the Court found subsection (B) applied and based on the totality of the circumstances the State failure to present the video was excused. Both parties filed timely Petitions for Rehearing. On August 22, 2019, the Court of Appeals denied both Petitions.

### **Factual Background**

Deputy Snelgrove arrived at the scene of an accident around 6:46 PM. (App.45) When he arrived, EMS and the fire department were already on scene. Deputy Snelgrove saw Kinard shouting and "throwing his hands up." (App.46). He indicated Kinard is "screaming, using profanity" while EMS is trying to check him out. (App.47). Deputy Snelgrove tries to calm him down, but Kinard "squares off" at him and continues to scream profanities and that "I'm the motherfucking God." Deputy Snelgrove can smell the alcohol on Kinard while he is screaming and cursing. (App.47). As a result, Deputy Snelgrove, for everyone's safety, places Kinard in handcuffs and arrests him for disorderly conduct. He places Kinard in the back of his patrol car. (App.48).

About ten minutes after Deputy Snelgrove arrived, Trooper Barnett arrived on scene to conduct the DUI investigation. Trooper Barnett is informed when he arrives that Kinard is in the back of Deputy Snelgrove's vehicle as a result of his arrest for disorderly conduct. (App.40; 53). He approached the vehicle to speak with Kinard, who refuses to talk and instead is doing "that thousand-yard stare." Trooper Barnett chose not to pull him out of the vehicle to put him on camera because it would go from a controlled situation to an uncontrolled situation. (App.40).

Throughout the interaction with Kinard, Trooper Barnett's in-car camera recorded the incident scene. (Video Recording of Incident Scene). Trooper Barnett specifically addresses Kinard upon opening the door to Deputy Snelgrove's vehicle.<sup>2</sup> Trooper Barnett asks Kinard to look at him and then asks him to discuss the accident. The Trooper then notes based on Kinard'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 Kinard his Miranda rights, which are clearly heard on the video recording.<sup>3</sup> Kinard does not respond when asked if he understood his rights, and after a moment, Trooper Barnett indicates he will take Kinard's silence as he understood his rights. Kinard 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 Kinard's counsel agreed at the hearing: "You do hear the Miranda . . . you do hear the arrest . . . ." (App.20).

Approximately six minutes after Kinard is placed under arrest for DUI, the Deputy has to again confront Kinard because Kinard is becoming unruly in the Deputy's vehicle. (Video Recording of Incident Scene). He tells Kinard he is not coming out of the vehicle. The Kinard continues to express his belief he is God and use profanity. He also tells the officers not to put their hands on him when they are attempting to secure his seat belt in the back seat of the Deputy's vehicle. (Video Recording of Incident Scene).

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<sup>2</sup> There is absolutely no assertion by Kinard 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; App.20; 23; 38).

<sup>3</sup> No argument has been made that the Miranda warnings were deficient in any way.

## ARGUMENT

- I. **The Court of Appeals properly concluded the trial court erred in failing to consider the totality of circumstances under section 56-5-2953(B) and correctly reversed the trial court's dismissal and remanded the case for trial.**

The Court of Appeals correctly 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. As a result, this Court should deny Kinard's Petition for Writ of Certiorari as to this issue.

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 this Court in State v. Henkel, 413 S.C. 9, 774 S.E.2d 458 (2015). The 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.<sup>4</sup> As a result of this 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 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,

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<sup>4</sup> While Henkel involved the 2008 version of the statute, the language of subsection (B) has remained essentially unchanged.

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 Kinard’s conduct at the scene. Individuals not associated with law enforcement or first responders also witnessed Kinard’s conduct. Additionally, Trooper Barnett specifically noted the strong odor of alcohol on Kinard’s person.

In the instant case, if this Court finds the video recording presented failed to conform because it does not “show” Kinard<sup>5</sup> 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 Kinard was in handcuffs and placed in his vehicle because he was under arrest for disorderly conduct. (App.41; 48). On the video, Deputy Snelgrove clearly informs Trooper Barnett upon the Trooper’s arrival that Kinard 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 Kinard, 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.

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<sup>5</sup> Again, as noted in the State’s Petition for Writ of Certiorari, the State believes the term “show” should mean to document and the video in this case complied with the statutory requirement and legislative intent to document the interaction between Kinard and the officers.

(6/8T.27; R.38). When asked whether he ever asked Kinard to get out of the vehicle, Trooper Barnett responded: "Based on demeanor; no, sir." (App.41-42). 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." (App.43). Shortly after Kinard 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 Kinard was not cooperative and it is absurd to require Trooper Barnett to remove Kinard 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 Kinard'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) Kinard 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 Kinard 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. Accordingly, the Court of Appeals properly applied section 56-5-2953(B) in this case and correctly reversed the trial court's dismissal and remanded for a trial. This Court should deny Kinard's Petition for Writ of Certiorari on this ground.

**CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that this Court should deny Kinard's Petition for Writ of Certiorari to the Court of Appeals.

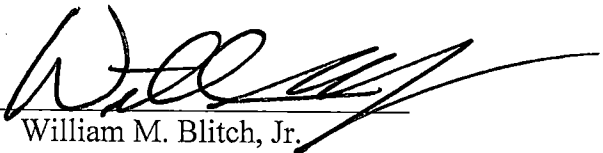
Respectfully submitted,

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October 1, 2019

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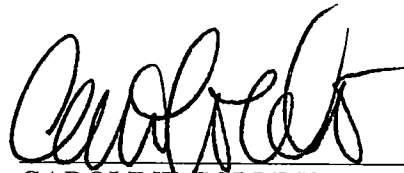
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**PROOF OF SERVICE**  
\_\_\_\_\_

I, Caroline Collins, certify that I have served the within State's Return to Petition For Writ of Certiorari to the Court of Appeals by having delivered a copy 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 1<sup>st</sup> day of October, 2019.



\_\_\_\_\_  
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Re: State v. Tony L. Kinard  
Appellate Case Tracking No. 2019-001604

Dear Mr. Laubshire and Mr. Dolce:

I am enclosing a copy of the State's Return to Petition for Writ of Certiorari to the Court of Appeals in the above-referenced case.

If you have any questions concerning this matter, please contact me.

Sincerely,

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

cc: Honorable Daniel E. Shearouse (original and six enclosed)  
Honorable Jenny A. Kitchings  
Victim Advocacy Division (enclosure)