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ORIGINAL

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

The State

Appellant,

vs.

Tony Latrell Kinard,

Respondent.

RECORD ON APPEAL

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RECEIVED

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SC Court of Appeals

INDEX

Order of Dismissal	1
Order Denying Reconsideration	5
Transcript June 8, 2016 Hearing	12
Transcript July 25, 2016 Hearing	71
Indictment	109
Uniform Traffic Ticket	111

11080

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

) IN THE COURT OF GENERAL SESSIONS
) FOR THE EIGHTH JUDICIAL CIRCUIT
)

State of South Carolina,

Ticket No.(s): H390372 & H390373
Indictment No.: 2016-GS-36-0107

v.

Tony Latrell Kinard,
Defendant.

ORDER

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

[Handwritten signature]

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 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 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 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.

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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
Lammers, South Carolina

[Signature]
 Donald B. Hocker

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF NEWBERRY)

IN THE COURT OF GENERAL SESSIONS
 FOR THE EIGHTH JUDICIAL CIRCUIT

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, 2016¹ 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 be 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

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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 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 construe the exception to require compliance with subsection (A) when it becomes practicable to begin videotaping." Henkel, 774 S.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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DJA

10. Based on the above, and based on the findings of fact and conclusions of law in my previous order in 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/Order 1

#7

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

I N D E X O F W I T N E S S E S

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

(SW) Mickey Barnett

Examination by The Court:	27
Cross-examination by Mr. Daniel:	28
Cross-examination by Mr. Laubshire:	28
Examination by The Court:	30

(SW) Jesse Snelgrove

Direct examination by Mr. Daniel:	31
Cross-examination by Mr. Laubshire:	37
Examination by The Court:	40

Certificate of Reporter	59
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EXHIBITSCourt's

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE#</u>
1	Video	X		26

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

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

6 MR. LAUBSHIRE: I do, Your Honor.

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

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

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

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

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

1 1:15. Will Solicitor Scott be back then?

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

4 MR. LAUBSHIRE: It is.

5 MR. DANIEL: Is that the only one?

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

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

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

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

22 THE COURT: You sure can.

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

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

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

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

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

22 MR. LAUBSHIRE: That is correct.

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

24 MR. LAUBSHIRE: There is no video at all.

25 THE COURT: That is not your complaint because I had

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

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

8 THE COURT: That is going to be an issue?

9 MR. LAUBSHIRE: It is an issue for sure.

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

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

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

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

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

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

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

1 such a danger to himself or others.

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

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

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

1 MR. DANIEL: Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

10 THE COURT: What case is that?

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

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

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

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

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

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

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

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

14 (Whereupon, a break was taken.)

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

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

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

24 THE COURT: Sure.

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

1 the Court.

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

4 MR. DOLCE: Yes, sir.

5 THE COURT: Okay. All right.

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

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

11 MR. DOLCE: 3:30.

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

13 MR. DOLCE: Yes, sir.

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

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

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

24 MR. DOLCE: Okay. Thank you very much.

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

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

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

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

25 (Whereupon, the jury was excused from open court for

1 a lunch break.)

2 THE COURT: Okay. What I want to do, Solicitor,
3 let's just take about a 10-minute break. You get the
4 video up to where it needs to be and make sure that Mr.
5 Laubshire and Mr. Dolce are in agreement, yeah, this is
6 what I need to see and try to make a determination about
7 what is or what is not shown on it. So we'll take about a
8 10-minute break, and let me know when you've got it ready,
9 okay?

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

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

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

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

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

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

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

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

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

10 THE COURT: Sure.

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

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

5 THE COURT: Okay.

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

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

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

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

23 THE COURT: You sure can.

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

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

7 THE COURT: Right.

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

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

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

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

21 THE COURT: Sure.

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

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

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

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

9 (Whereupon, a short break was taken.)

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

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

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

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

24 MICKEY BARNETT, being
25 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

1 Barnett.

2 CROSS-EXAMINATION

3 BY MR. DANIEL:

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

7 A Yes, sir.

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

9 A Yes, sir. Deputy Snelgrove's car.

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

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

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

21 MR. LAUBSHIRE: Yes, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. LAUBSHIRE:

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

1 A Based on demeanor; no, sir.

2 Q Did you ask this deputy to turn his lights off?

3 A No, sir. Because at the time, I wasn't doing a DUI
4 investigation. So I didn't have the blue lights turned
5 off, because we weren't doing field sobriety at that time.

6 Q When you go to the apex of that door, isn't it true
7 that you arrested him for DUI?

8 A Then, yes sir.

9 Q Is there any reason why you didn't have the deputy
10 turn his lights off?

11 A Because there is no field sobriety being done, sir.
12 Field sobriety comes into play, the lights come into play
13 when we do field sobriety, so it's not reflecting in their
14 face.

15 Q And what about the arresting Miranda, so we can catch
16 that on video?

17 A You did, sir. You saw me standing in the apex of the
18 door and I gave it to him on video. And I explained that
19 based on his demeanor with the thousand-yard stare, I
20 wasn't going to get him out the car with that.

21 Q I saw the reflective vest only. Where exactly were
22 you?

23 A The reflective vest, I was in the apex of the door.
24 I didn't have my reflective vest on, because we were on
25 the off-ramp and I had just gotten out for the accident

1 investigation. I hadn't put my reflective vest on.

2 Q Did my client do anything aggressive toward you at
3 all?

4 A At this point; no, sir. But later he did; yes, sir.

5 Q But at this point right now, not down the road, I'm
6 talking about right here, right now. Did he do anything,
7 did he make any moves to be aggressive towards you
8 directly?

9 A I would say the thousand-yard stare would be
10 considered an aggressive stance or a stance that leads me
11 to believe that something else could happen if I was to
12 get him out of the car, sir.

13 Q Well, nothing else happened. He made no actual moves
14 towards you or anything like that?

15 A He refused to speak to me.

16 Q And he was in handcuffs?

17 A Yes, sir.

18 Q Was he under control?

19 A He was under detention; yes, sir.

20 MR. LAUBSHIRE: No further questions of the witness,
21 Your Honor.

22 THE COURT: All right.

23 EXAMINATION BY THE COURT

24 BY THE COURT:

25 Q There was a person that I saw standing at the door.

1 Presumably that was you, correct?

2 A Yes, sir. That's me.

3 Q Okay. All right. Had you had a, leading up to that,
4 had you had any conversations with the deputy concerning
5 why the defendant was in the car?

6 A Yes, sir.

7 Q Okay.

8 A Prior to this, Deputy Snelgrove had told me what had
9 occurred when he arrived on the scene and that's why he
10 was in there.

11 THE COURT: Okay. All right. All right. Let's take
12 some in-camera testimony, Solicitor Daniel, from the
13 deputy as far as what all he observed prior to the trooper
14 coming on-scene.

15 MR. DANIEL: Yes, sir. Deputy Jesse Snelgrove, Your
16 Honor.

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

19 DIRECT EXAMINATION

20 BY MR. DANIEL:

21 Q All right. Deputy Snelgrove, you're employed with
22 the Newberry Sheriff's Office?

23 A Yes, sir.

24 Q And were you on duty the evening or night of November
25 3rd, 2015?

1 A Yes, sir.

2 Q Were you dispatched out to I-26 around the exit 74
3 westbound ramp where Highway 34 intersects with the
4 Interstate?

5 A Yes, sir.

6 Q And what was that call; why were you dispatched out
7 to that location?

8 A I was called out there for a wreck, just to assist
9 Highway with a wreck.

10 Q Okay. What type of wreck, multiple vehicles
11 involved?

12 A At that time, they didn't tell me, but all they had
13 told us at that time was a wreck.

14 Q But the Highway Patrol has the mandate to investigate
15 traffic accidents, correct?

16 A Yes, and we just go just to assist with keeping
17 traffic moving and stuff like that.

18 Q Okay. So approximately what time do you arrive at
19 this wreck scene?

20 A I get on-scene at 18:46 which is 6:46 in the evening.

21 Q At 6:46 p.m. you arrived?

22 A Yes, sir.

23 Q Okay. It's dark out?

24 A Yes, sir.

25 Q All right. And what do you observe when you arrived

1 on scene?

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

11 Q Okay. Who was identified as this black male?

12 A The defendant, Mr. Kinard.

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

15 A Yes, sir.

16 Q And a black female--

17 A Yes, sir.

18 Q --was on the scene?

19 A Yes, sir.

20 Q Was the Fire Department on the scene?

21 A Yes, sir.

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

24 A Yes, sir.

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

1 arrival?

2 A Right.

3 Q All right. So Mr. Kinard is throwing his hands up in
4 front of EMS while they're trying to check him out?

5 A While they're trying to check him out; yes, sir.

6 Q All right. What's he saying and things like that,
7 demeanor?

8 A He's just mainly shouting at them, screaming, using
9 profanity. And at this point, I walk up to him to try to
10 calm everything down. He's still shouting. When I get up
11 there, he squares off at me to start with. I'm trying to
12 get him to calm down. But he's still, he's cursing and,
13 excuse my language on this, but--

14 Q No, tell us exactly what he said.

15 A First he starts yelling, fuck you. Excuse me, fuck
16 you, motherfucker. What the fuck are you going to do.
17 And while he's shouting, that's when I can smell alcohol
18 on his breath to start with. I tried to calm him down a
19 little bit and after a few minutes talking to him, he
20 squares off at me a second time and balls up his fist and
21 he's got this like thousand-yard stare going on. The
22 second time he yells and curses he says, fuck you. I'm
23 the motherfucking God. Fuck you, son of a bitch. And he
24 has this like God complex. And at this point, he's still
25 throwing his hands around. I go ahead and for his safety

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

4 Q Did you feel threatened at that point?

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

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

9 A With the thousand-yard stare, yeah.

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

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

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

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

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

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

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

1 A It wasn't long. Maybe 10 minutes at the max.

2 Q All right. And did you receive any other information
3 that was pertinent to this case from any witnesses
4 on-scene?

5 A I was advised by Mr. Werts that the black female that
6 was with Mr. Kinard had taken stuff out the car. He told
7 me she'd taken out some alcohol and some bottles. I
8 relayed that to Trooper Barnett. And I actually asked the
9 black female at that time if she'd taken anything out and
10 she'd told me no, that she hadn't taken out anything but
11 the baby seat and some papers. I told Trooper Barnett
12 when he arrived on the scene and she did turn over and
13 advise that she did take some alcohol bottles out of the
14 car.

15 Q Okay. So you relayed all that information to Trooper
16 Barnett for the purposes of his DUI investigation?

17 A Yes, sir.

18 Q So open containers were discovered--

19 A Yes.

20 Q --in the vehicle Mr. Kinard had been driving?

21 A Not at the point I was there. They had been taken
22 out by the female and they were, the Crown Royal bottle, I
23 believe it is, was inside her car. And the beer bottle
24 she advised thrown on the side of the road, but all of
25 those were collected for Trooper Barnett.

1 Q Is your patrol car equipped with dash cam or in-car
2 video?

3 A No, sir.

4 Q Okay. Is your car equipped with that now?

5 A No, sir.

6 Q And what's the reason why the Sheriff's Office or
7 you, in particular, do not have that recording system?

8 A Honestly, I don't know. I guess, they're trying to
9 get the funding for it.

10 Q So it's your understanding it's just lack of funding?

11 A Yes, sir.

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

14 THE COURT: Mr. Laubshire.

15 CROSS-EXAMINATION

16 BY MR. LAUBSHIRE:

17 Q Deputy, my client was just in a wreck, wasn't he?

18 A I'm sorry, what?

19 Q My client was just in a wreck, wasn't he?

20 A Yes, sir.

21 Q So understandably upset?

22 A Yes, sir.

23 Q Now, you said he had squared off at you?

24 A Yes, sir.

25 Q What do you mean?

1 A He kind of got in like this fighting stance with one
2 leg staggered from the other, fists balled up.

3 Q Did you notice that he had a boot on his foot because
4 he just had surgery done?

5 A He advised me of that when he got in my car.

6 Q Did you see it?

7 A Yeah.

8 Q So his stance may have had something to do with that,
9 right?

10 A It could have.

11 Q Trying to keep the pressure off that foot? Now, did
12 he make any aggressive moves toward you? Did he try to
13 sort of punch at or kick at you or anything like that?

14 A No. At that point, no. Like I say, he just squared
15 off, balled his fist, but he kind of had a slight little
16 rock to him. But that could have been something else.

17 Q When you put him in handcuffs, how did that scenario
18 go?

19 A He tried to resist a little. I wouldn't really
20 classify it enough to charge him with resisting arrest,
21 but he did try to keep me from putting him in cuffs.

22 Q But you didn't charge him with resisting arrest?

23 A No, sir.

24 Q And you didn't charge him with assault and battery?

25 A No, sir.

1 Q Or any kind of assault or battery on a law
2 enforcement officer or anything like that?

3 A No, sir.

4 Q No interference with law enforcement; nothing?

5 A No, sir.

6 Q And you testified on direct from the Solicitor that
7 you don't have a camera in your car?

8 A Right.

9 Q And you don't know why you don't have a camera?

10 A Right.

11 Q And you've never been told why and you have no
12 records to show any requests for videotaping equipment or
13 anything like that?

14 A No.

15 Q No requisition forms, no documents, letters from you?

16 A No, sir.

17 Q Have you ever asked anyone on your command staff as
18 to why you don't have a camera?

19 A The last I was told is it's trying to get the money
20 for it, so I haven't asked recently.

21 Q And today you didn't bring any records with you to
22 show the Court as to why you don't have a camera?

23 A No, sir.

24 Q I just want to be real clear. My client didn't
25 actually make an aggressive action towards you to actually

1 strike you?

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

4 MR. LAUBSHIRE: One second, Your Honor.

5 THE COURT: Sure, take your time.

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

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

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

11 THE COURT: Okay.

12 EXAMINATION BY THE COURT

13 BY THE COURT::

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

16 A Yes, sir.

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

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

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

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

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

1 can't be captured.

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

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

19 THE COURT: Right.

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

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

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

1 winded.

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

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

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

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

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

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

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

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

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

25 MR. LAUBSHIRE: May I add one thing?

1 THE COURT: Sure.

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

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

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

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

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

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

4 THE COURT: All right.

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

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

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

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

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

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

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

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

19 MR. LAUBSHIRE: Well,--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 THE COURT: All right. All right.

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

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

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

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

11 THE COURT: Okay.

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

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

19 MR. DANIEL: Yes, sir.

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

23 (Whereupon a lunch break was taken.)

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

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

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

20 MR. LAUBSHIRE: They were, Your Honor.

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

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

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

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

14 THE COURT: Okay. Anything further from the State?

15 MR. SCOTT: No, sir.

16 THE COURT: Okay. All right. Thank you very much.

17 This matter is concluded.

18 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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4 CERTIFICATE OF REPORTER

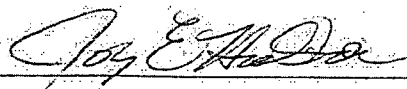
5 State of South Carolina)

6 County of Newberry)

7
8 I, Joy E. Holston, Official Court Reporter for the
9 Eighth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete transcript of record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the County of Newberry, South
14 Carolina on the 6th day of June, 2016.

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

17
18 September 5, 2016

19
20
21 

22 Joy E. Holston, Court Reporter

23 My Commission expires: May 2, 2026
24
25

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF LAURENS) IN THE COURT OF GENERAL SESSIONS

3 The State,)
4 -vs-) TRANSCRIPT OF RECORD
5 Tony Latrell Kinard,) 2016-GS-36-0107
6 Defendant.) July 25, 2016
7 Laurens, South Carolina

8
9
10 B E F O R E:

11 HONORABLE DONALD B. HOCKER, JUDGE
12

13
14 A P P E A R A N C E S:

15 TAYLOR W. DANIEL, ESQUIRE
16 Attorney for the State

17 RICHARD J. DOLCE, ESQUIRE
18 MICHAEL V. LAUBSHIRE, ESQUIRE
19 Attorneys for the Defendant
20
21
22

23 ORIGINAL

Margaret A. Woods
Circuit Court Reporter

ORIGINAL

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

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

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

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

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

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

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

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

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

11 MR. DANIEL: Yes, sir.

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

14 MR. DANIEL: Sure.

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

17 MR. DANIEL: Oh, okay.

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

20 THE COURT: Okay.

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

24 THE COURT: Yeah.

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

1 that we can have ---

2 THE COURT: Yeah, ---

3 MR. DOLCE: --- a hearing today.

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

6 (Pause.)

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

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

11 THE COURT: Sure.

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

14 THE COURT: I I I do.

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

21 MR. DOLCE: And and ---

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

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

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

25 (Indiscernible cross-talk.)

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

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

9 MR. DANIEL: Yes, sir.

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

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

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

20 MR. DANIEL: Uh, ---

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

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

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

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

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

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

9 MR. DOLCE: --- but ---

10 THE COURT: Yeah.

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

14 THE COURT: Right.

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

17 THE COURT: Right.

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

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

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

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

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

5 THE CLERK: Yes, sir.

6 THE COURT: --- these documents?

7 THE CLERK: Um-hum.

8 THE COURT: Everybody be at ease.

9 (Whereupon, a recess was taken.)

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

12 MR. DANIEL: Thank Your Honor, and again, just kind of a
13 brief, uh, summation of the facts. Uh, this is a a DUI case
14 stemming from November 3rd of last year incident date, uh, it
15 involves a two-car collision, uh, that occurs around, uh, 6:30
16 p.m., it's dark at this point 'cause it's November, November
17 3rd, 2015, uh, the, uh, defendant Tony Kinard is operating a,
18 uh, a Mazda car, a two two-door Mazda vehicle, he rear-ends,
19 uh, another motorist who's traveling in a Chevy pick-up truck,
20 Vic Theriot, and this occurs, uh, Exit 74 I-26 westbound Exit
21 74 ramp. Uh, Vic Theriot in his Chevy truck exits right there
22 on mile marker 74, he's at the stop sign, he would testify to,
23 uh, Mr. Kinard approaching him at a high rate a speed, doesn't
24 really even see the lights and all of a sudden is rear-ended.
25 Uh, the Chevy truck that the Vic Theriot's in goes forward

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

16 MR. LAUBSHIRE: Judge, ---

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

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

20 THE COURT: Right.

21 MR. LAUBSHIRE: --- this hearing.

22 THE COURT: Right.

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

1 THE COURT: Well ---

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

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

8 MR. LAUBSHIRE: Yes, Your Honor.

9 THE COURT: Thank you. Go ahead.

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

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

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

1 THE COURT: Now ---

2 MR. DANIEL: --- Tony ---

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

4 MR. DANIEL: --- Kinard ---

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

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

11 THE COURT: --- and ---

12 MR. DANIEL: --- silhouette ---

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

14 MR. DANIEL: --- outline.

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

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

20 THE COURT: Right.

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

24 THE COURT: Yeah.

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

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

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

17 MR. LAUBSHIRE: Yes, Your Honor.

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

20 MR. DANIEL: Yes.

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

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

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

13 THE COURT: Alright.

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

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

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

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

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

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

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

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

15 THE COURT: Well ---

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

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

18 MR. DANIEL: --- testimony ---

19 THE COURT: --- and ---

20 MR. DANIEL: --- from.

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

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

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

13 THE COURT: Okay, alright.

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

1 THE COURT: Right.

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

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

21 MR. DOLCE: And and ---

22 THE COURT: --- in in ---

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

24 THE COURT: --- letting ---

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

1 that my objection was, uh, preserved.

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

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

1 that case were, uh, it's a one-car collision, by the time the
2 trooper gets on scene, uh, suspect had fled but there's open
3 containers, the smell of alcohol in the vehicle. Eventually
4 they catch up to the suspect, uh, sometime later walking down
5 I-385, they already have a name from the registration the
6 vehicle, uh, at that point, uh, EMS is called on scene because
7 there's, uh, injuries, uh, uh, this suspect, defendant,
8 suffered injuries in the wreck, so you have ambulance on scene
9 and the trooper that point, uh, thinks he's about to be
10 transport the hospital, the defendant, so he, uh, Mirandizes
11 him and does a HGN test in the backseat a ambulance and so
12 nothing's caught on the in-car video system, uh, eventually
13 though the ambulance says he's fine, we'll discharge him, he
14 doesn't need go the hospital and so, uh, the defendant in the
15 *Henkel* is taken, uh, is placed into custody for DUI but that
16 case stands for the proposition that, uh, strict compliance,
17 uh, with Miranda in that scenario would eviscerate, uh, the
18 2953 (B) exceptions and I would, uh, I have that case printed
19 out and it's in my memo but some language in that case, Your
20 Honor, and a course they go to statutory, uh, construction,
21 "The primary rule a statutory construction is to ascertain and
22 give effect to the intended legislature," and so and they cite
23 how, uh, that the recording the videotaping statute is meant
24 to create direct evidence of a DUI arrest such as field
25 sobriety test 'cause the legislature when they passed that

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

15 THE COURT: Right.

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

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

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

3 And I guess, Your Honor, my third point, uh, I believe
4 you wanted me to kind of a get into, even if you do assume
5 that, uh, subsection (B) exception doesn't apply and the
6 videotaping just does not satisfy the requirements, the *State*
7 *v. Gordon* case which is also in my memorandum of law, uh, it's
8 a South Carolina Supreme Court case from last year, 414 S.C.
9 94, uh, that discusses the proper remedy would be redacting
10 the video, not outright dismissal, uh, but I would say the
11 *Henkel* is probly my strongest argument that's supported by
12 case law, again, there's no case law that supports my argument
13 where, uh, sh -- Miranda being shown that particular portion
14 is interpreted but I would just say that Black's Law
15 Dictionary does not define "show" with "see," what matter is
16 Miranda is heard and perceived, uh, and, again, uh, I think
17 just having the defendant, uh, be placed in front of the camera
18 would add nothing to this this case, Your Honor, it would
19 bec -- it would be a hyper, uh, technicality and it would be,
20 uh, an extreme remedy as the *Gordon* court, uh, annunciated.

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

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

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

3 MR. DANIEL: Thank you.

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

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

22 THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. DOLCE: Your ---

17 THE COURT: --- Dolce ---

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

19 THE COURT: --- wanna add ---

20 MR. DOLCE: --- one ---

21 THE COURT: --- something?

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

23 THE COURT: Sure.

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

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

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

3 MR. DANIEL: Yes, sir, Your Honor. As far as the
4 affidavit goes, the the *Manning* case is directly on point,
5 Your Honor, that's a, that's a Court of Appeals 2012 decision,
6 400 S.C. 257, a traffic accident investigation, that was a
7 felony DUI case in *Manning*, uh, they had absolutely no video
8 and no affidavit and, uh, they're saying that no affidavits
9 are required, uh, when it's a traffic accident, uh, so the
10 affidavit issue is very straightforward in that no affidavit
11 is required that, uh, when you're dealin' with a traffic
12 accident investigation, uh, and, again, I'm usin' the seventh
13 edition, Black's Law Dictionary Seventh Edition, I saw a
14 copyright of 1999, "show" did not have the word "see" at all
15 in there, "show" said, "To make apparent or clear by evidence;
16 to prove," uh, and again, context matters, Your Honor, if
17 we're talkin' about somethin' that has to be heard, seeing it
18 would would not be meaningful, it's hearing it and we do hear
19 it and we know from watching the video in in totality that
20 Mr. Kinard is in the backseat a that patrol car and, uh, he's
21 non-responsive in that patrol car, he's not really talking to
22 troopers, uh, and again, there are, they're not alleging a
23 Miranda violation here, Your Honor, I think that's that's
24 important. There's nothing meaningful that would be conveyed
25 on that video and I submit if it weren't for the fact that I

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

14 THE COURT: Alright.

15 MR. DANIEL: Thank you.

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

20 MR. LAUBSHIRE: Could ---

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

22 MR. LAUBSHIRE: --- I ---

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

24 MR. LAUBSHIRE: I I would, ---

25 THE COURT: --- out there?

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

19 THE COURT: Okay.

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

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

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

8 MR. LAUBSHIRE: Thank Your Honor.
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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

Ympkison
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- 6107

THE STATE

vs.

Tony Latrell Kinard

INDICTMENT FOR

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

CDR: 3363

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

INDICTMENT FOR

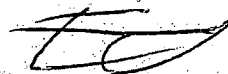
110

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

Form 438
Rev. 9/10

SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY

UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS

FIRST NAME MIDDLE NAME LAST NAME

T. J. L. K.

STREET AND NO. CITY STATE ZIP CODE

[REDACTED] [REDACTED] [REDACTED] [REDACTED]

STATE LICENSED DRIVER'S LICENSE NO. CDL ORI. LIC. CLASS

[REDACTED] [REDACTED] [REDACTED] [REDACTED]

VEH. LIC. NO. STATE MAKE OF VEH. YEAR COMB. VEH. AUTO DISGR. VEH. COMB.

[REDACTED] SC AL-2 13 HAZ. MT. MOPED MTRCYCL. OTHER

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT STREET AND NO.

Trap C. 3289 Louisa Rich Rd

DATE OF TRIAL TIME OF TRIAL CITY STATE ZIP CODE

11/17/2015 10 AM [REDACTED] SC 29108

VIOLATION - COURT APPEARANCE REQUIRED YES NO VIOLATION SECTION NO.

[REDACTED] 1st [REDACTED]

OWNER OF VEHICLE DATE OF ARREST

[REDACTED] 11/3/2015

ADDRESS OF OWNER DATE OF VIOLATION

[REDACTED] 11/3/2015

BAIL DEPOSITED NAME OF ARRESTING OFFICER RANK

[REDACTED] M. B. [REDACTED] 5th

RACE SEX BIRTH DATE HT. WT. EYES

[REDACTED] M [REDACTED] 5'7" 155 [REDACTED]

DESCRIPTION OF ACCUSED COUNTY NUMBER

[REDACTED] [REDACTED] 36

DATE BAIL RECD. BY BADGE TROOP

[REDACTED] [REDACTED] 93 2

CASE BEFORE MAGISTRATE [] MUN. COURT []

CIRCUIT COURT [] FAMILY COURT [] FEDERAL COURT []

NAME OF TRIAL COURT IF DIFFERENT FROM ABOVE

[REDACTED]

DEFENDANT: DID NOT APPEAR [] APPEARED []

DISPOSITION

NOLLE PROSSO [] GUILTY []

FORFEITED BOND [] PLED: NOLO CONTENDERE []

CITY CODE

[REDACTED] [REDACTED]

TRIAL BY: TRIAL JUDGE [] JURY []

VERDICT OF GUILTY [] DATE OF TRIAL IF ANY

[REDACTED] [REDACTED]

TRIAL IF ANY NOT GUILTY []

JAIL SUSPEND FINE AMT. COLLECTED AMT. SUSPENDED

[REDACTED] [REDACTED] [REDACTED] [REDACTED]

COMMITTED TO: Vehicle Searched Arrest as Result of Collision

[REDACTED] [REDACTED] [REDACTED]

CERTIFIED CORRECT DATE

[REDACTED] [REDACTED]

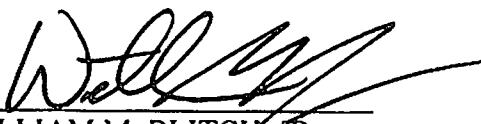
H 390372

TRIAL COURT COPY

DOCKET NO.

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.
Assistant Attorney General
S.C. Bar Number 15608

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(803) 734-3727

ATTORNEY FOR APPELLANT

July 28, 2017

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SC Court of Appeals