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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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

STATEMENT OF THE CASE

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

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

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

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

ARGUMENT

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

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

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

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

Section 56-5-2953 requires:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subsection B of the statute provides:

> In circumstances including, but not limited to, . . . , traffic accident investigations, . . . where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section.

S.C. Code Ann. § 56-5-2953(B) (2014). The subsection was addressed by the South Carolina Supreme Court in State v. Henkel, 413 S.C. 9, 774 S.E.2d 458 (2015). The Supreme Court interpreted the above subsection and concluded, "the phrase 'as soon as videotaping is practicable in these circumstances,' applies to both when videotaping must 'begin' and when videotaping must 'conform to the provisions of this section.'" Henkel, 413 S.C. at 15, 774 S.E.2d at 462.[4] As a result of the Supreme Court's interpretation, the conformity must begin as soon as practicable, and not just begin upon the start of video recording. Further, this view is consistent with the legislative purpose as explained by the Supreme Court: "Here, the legislative concerns with videotaping one-on-one traffic stops to capture the interactions between an officer and the subject are not present. See Sweat, 386 S.C. at 350, 688 S.E.2d at 575 (holding 'language must

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

be construed in light of the intended purpose of the statute.')." Id. As in Henkel, in this case numerous officers and emergency personnel observed Respondent's conduct at the scene. Individuals not associated with law enforcement or first responders also witnessed Respondent's conduct. Additionally, Trooper Barnett specifically noted the strong odor of alcohol on Respondent's person.

In the instant case, if this Court finds the video recording presented failed to conform because it does not "show" Respondent then it was not practicable to conform to the requirements and, under subsection (B) and the Supreme Court's interpretation in Henkel, the failure to conform would not require dismissal. A review of the testimony and video in this case clearly demonstrates why it was not possible to conform and demonstrates the error of Judge Hocker's decision. Deputy Snelgrove testified Respondent was in handcuffs and placed in his vehicle because he was under arrest for disorderly conduct. (6/8T.28; 35; R.39; 46). On the video, Deputy Snelgrove clearly informs Trooper Barnett upon the Trooper's arrival that Respondent was in the Deputy's car because he was making threats to the Deputy and other individuals. (Video of Incident Scene). Further, when Trooper Barnett makes initial contact with Respondent, he refuses to answer any questions or to address the Trooper, thereby demonstrating a lack of cooperation. (Video of Incident Scene). Trooper Barnett testified:

> I got back here to talk to Mr. Kinard to get my initial accident investigation out of the way. Mr. Kinard was staring straight ahead. He will not speak to me. He's doing that thousand-yard stare. Based on that, I didn't pull him out of the vehicle, because I didn't want to pull him out of a controlled situation and put him in an uncontrolled situation just to put him on camera.

(6/8T.27; R.38). When asked whether he ever asked Respondent to get out of the vehicle, Trooper Barnett responded: "Based on demeanor; no, sir." (6/8T.28-29; R.39-40). The Trooper further explained: "I would say the thousand-yard stare would be considered an aggressive

stance or a stance that leads me to believe that something else could happen if I was to get him out of the car, sir." (6/8T.30; R.41). Shortly after Respondent is read his Miranda rights and placed under arrest for DUI, he begins to act unruly in the backseat of Deputy Snelgrove's vehicle. He tries to get out of the back of the vehicle, uses profanity, and continues to express his belief he is God. (Video of Incident Scene). The only evidence in this Record indicates Respondent was not cooperative and it is absurd to require Trooper Barnett to remove Respondent from the vehicle for the purpose of advising him of Miranda and placing him under arrest, solely to return him to the vehicle. As a result, it was not practicable to conform to the requirements of Subsection (A) because of Respondent's behavior and interactions with the officers.

Additionally, Subsection (B) allows the trial court to consider the totality of the circumstances in determining whether to dismiss the case or whether to excuse any failure to conform. S.C. Code Ann § 56-5-2953(B) ("Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances . . . ."). In this case, the circuit court failed to consider the totality of the circumstances and committed an error of law in concluding Subsection (B) did not apply. The totality of the circumstances, most notably the facts 1) Respondent was already under arrest for disorderly conduct; 2) he in handcuffs and in the back of a patrol vehicle based on his behavior and an aggressive, threatening stance toward the Deputy and other individuals at the scene; 3) he refused to cooperate with Trooper Barnett; and 4) the conditions of the scene; justify the actions of the Trooper and excuse the failure to remove Respondent from the vehicle solely for the purpose of advising him of his Miranda rights and placing him under arrest. The futile act of removing him, only to place him back in the patrol car after exposing the officers to the

risk associated with a highly intoxicated individual who has already expressed a God complex and took a threatening posture with one deputy, should not require dismissal of the case under the totality of the circumstances.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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