STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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S.C. SUPREME COURT

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 RESPONDENT

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II. The Circuit Court did not err in failing to properly consider the totality of the circumstances under S.C. Code Ann. §56-5-2953(B), as well as its requirement that the video recording must comply with S.C. Code Ann. §56-5-2953(A) only once it is practicable.

STATEMENT OF THE CASE

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 Barnett activated his in-car video camera. Newberry County Deputy Snellgrove was already on scene and had detained the Respondent by placing him in handcuffs and in the rear of his patrol vehicle. (R.p 49) The Respondent never physically appears on Trooper Burnett's at-scene video because he is handcuffed and in the rear of Trooper Snellgrove's car. (R.p 39) Deputy Snellgrove does not have any recording of this incident because his vehicle was not equipped with a video camera. (R.p 49-50) Deputy Snellgroves blue lights are flashing during the entire video making it difficult to see what is happening on the video. No field sobriety tests are conducted at the scene. The Respondent is never taken out of Deputy Snellgrove's vehicle, therefore, the arrest of the Respondent is not on the video and the Respondent is not shown being advised of his Miranda Rights. (R.p 39-42) Neither the Trooper or the Deputy submitted an affidavit of failure to provide video recording.

ARGUMENT

I. The Circuit Court did not err in dismissing the case based on an erroneous interpretation of S.C. Code Ann. §56-5-2953(A) and its requirement the video recording "show the person being advised of his Miranda rights."

The circuit court correctly dismissed this case. First, the circuit court correctly interpreted S.C. Code Ann. §56-5-2953(A) of the South Carolina Code which requires the Respondent to be on camera at the time he is arrested and read his Miranda rights. Second, the remedy for failure to comply with this statutory requirement 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).

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. 2011). A court should not attempt to divine the intent of the legislature when the statutory language of the statute is clear and unambiguous. Id. Thus, in interpreting a statute, a court should give words their plain and ordinary meaning, and not resort to forced construction that would limit or expand the statute in question. Id. The provision of a statute are penal in nature, the statute must be strictly construed against the State in favor of the Defendant. Id. Criminal statutes must be strictly construed against the State in favor of the defendant. State v. Castineria, 341 S.C. 619, 625-26 (Ct. App. 2000). When the terms of a statute are unclear and ambiguous the court must apply them accordingly to their literal meaning. State v. Leopard, 349 S.C. 467, 470-71 (Ct. App. 2002). Here the statute and the related case law is clear and dismissal is the appropriate remedy.

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. (empasis added)

(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.

At issue in this case is whether the State adequately met the requirements of showing the Respondent was properly arrested and advised of his Miranda rights on camera. The State contends that Trooper Barnett's video provides more than adequate evidence that the Respondent was clearly read his Miranda warnings as required by S.C. Code Ann. §56-5-2953. However, the Respondent is never seen on the at-scene video. In fact you can barely see Trooper Barnett, because of the flashing blue lights, reading Miranda rights while the Respondent was sitting in the back of Deputy Snelgrove's car. Respondent is not visibly present at all on the video recording at the exact time his arrested or his Miranda rights read. In construing the terms of §56-5-2953(A)(1)(a)(iii) which requires "the arrest of a person for a violation of §56-5-2930 or §56-5-2933, or a probable cause determination in that the person violated §56-5-2945, and show the person being advised of his Miranda rights," the plain and ordinary meaning of the statute is that the videotape must include the arrest of the Respondent and also show the Respondent as he is being advised of his Miranda rights.

In the case at bar, the arresting officer failed to comply with the requirements set forth in S.C. Code Ann. §56-5-2953, specifically the arresting officer did not videotape the arrest of the Respondent nor did he show the Respondent as he is being advised of his Miranda warnings and further there was no affidavit submitted to cure any defect in the case. The remedy for failure to comply with the above videotaping statute is a 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).

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 Respondent was not visibly present on the video recording at the exact time his Miranda Rights were read." In fact the Respondent was not visibly present at any time in the video recording presented by the State. Therefore, 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 by the Respondent, all of which include the requirement that the Respondent's entire body be seen in the video made during the arrest and testing process.

If the video did not properly show the Respondent as he is being read his Miranda rights, there was no alternative other than to dismiss the case; however, 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 Respondent was visible while undergoing field sobriety testing. In this case, all that can be seen on the video is flashing blue lights and the

silhouette of the Trooper standing at the door of the deputy's patrol car and reading Miranda rights. As stated above, the Respondent, who is said to be in the back seat of the Deputy's car, is not in any way visible.

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 Respondent while he is being advised of his Miranda rights and therefore does not provide the opportunity to make such an independent decision.

Neither the Deputy nor the Trooper had offered to assist the Respondent in getting out of the car so that he could be visible on the video while being arrested and read his Miranda rights. There was testimony that the Respondent 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 was no testimony concerning his demeanor and attitude at the time the Trooper could be seen arresting Respondent and reading him the Miranda rights advisement. The audio portion of the video recording indicates that the Respondent does not respond to the Trooper's questions concerning the Miranda rights advisement. Without being able to see the Respondent on the video it is not possible to determine if he actually heard and understood his Miranda rights. The legislative intent of the statute was that the Respondent be visible on the video recording during the whole process of a DUI arrest, including the arrest and reading of the Respondent's Miranda rights and the field sobriety tests (if any). Allowing a video recording in which only the Trooper can be seen during reading to the Respondent 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).

Concerning the issue of the risk and or danger that might have been involved in "forcing" the Respondent out of the car so that he could be seen on video, there is no evidence in this case that, at the time the Trooper arrested the Respondent and recited the Miranda rights, the Respondent would have been uncooperative and present a threat to the law enforcement officers or to himself. Respondent was already handcuffed, had a broken leg, and was wearing a brace on his leg. There is also no indication in any report or other evidence that the Respondent gave officers any difficulty or resisted when exiting the patrol car at the county jail.

While it is certainly possible that in a similar situation there may be a Respondent that is being belligerent or uncooperative, this case is limited by the facts presented, and those facts do not shed any light on the Respondent'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" The Respondent was never even asked to exit the vehicle. Accordingly, the circuit court specifically found the video did not comply with the statutory requirements set forth pursuant to S.C. Code Ann. §56-5-2953(A) and properly dismissed the case.

II. The Circuit Court did not err in failing to properly consider the totality of the circumstances under S.C. Code Ann. §56-5-2953(B), as well as its requirement that the video recording must comply with S.C. Code Ann. §56-5-2953(A) only once it is practicable.

The circuit court did not correctly find that subsection (B) does not apply to the instant case. Although this is an accident case, because a video recording exists in this matter, Section 56-5-2953(B) does not apply. Even assuming that it did apply, and that exigent circumstances existed such that the officers believed that attempting to remove the Respondent 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. If the Trooper had submitted an affidavit this entire appeal would not be necessary. There was a remedy for the State to comply with the videotaping statute, however, the State decided not to submit an affidavit. Further, as noted above, there was no evidence to support the contention that the Respondent was in fact unruly, combative or uncooperative at the time that the Trooper arrested Respondent and read the Miranda rights.

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. Then while the Defendant was in the ambulance, the arresting officer administered the Miranda rights advisement to him and conducted a field sobriety test, both of which were captured on an audio recording device, but not a video recording device. However, after later in the arrest sequence, the defendant was placed in the arresting officer's patrol vehicle. The in-car camera was faced towards him, and the officer read the defendant his Miranda rights again, all of which was recorded by the camera. The trial court denied the Defendant's motion to dismiss, recognizing that 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 in 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 Respondent 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, 774S.E.2d at 461). In this case, after video recording became practicable, the Miranda warnings were given but not recorded in compliance with the requirements of

Subsection (A). The statute was amended in 2009, but the amendments did not alter the requirement that once the video recording starts, full compliance with Subsection (A) is required.

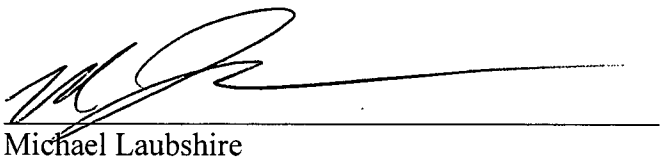
In State v. Manning, 734 S.E. 2d 314, 400 S.C. 257 (2012) which was cited by the State, at the time the investigating officers arrived, the Defendant had been taken to the hospital. Therefore, there were no field sobriety tests or Miranda warnings to be given at the accident site and Subsection (A) was inapplicable because the investigating officer and the defendant were never simultaneously present at the accident site, and therefore there was nothing to record. The fact that Subsection (A) was not applicable then allowed the Court to consider the exceptions in Subsection (B). However, again, in this case, Subsection (A) is applicable because, without dispute, video recording was practicable and began as soon as the arresting officer arrived. Manning is not helpful to the State's argument concerning compliance with Subsection (A) or the ability to utilize exceptions as set forth in Subsection (B) of the statute.

Based on the above, Section 56-5-2953(B) exceptions are not applicable in this matter, and that there is no evidence to support an argument that they would or should be. The video recording did not comply with the requirement of Section 56-5-2953 (A) that the Respondent be shown receiving his Miranda rights on the video recording that was made. The appropriate remedy, as previously set forth in the June 7, 2016 verbal order and the July 25, 2016 written order, is dismissal of the case. Accordingly, the circuit court specifically found the statutory requirements set forth pursuant to S.C. Code Ann. §56-5-2953(B) did not apply especially since no affidavit was ever filed and properly dismissed the case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the circuit court be AFFIRMED and this case DISMISSED.

Respectfully submitted,



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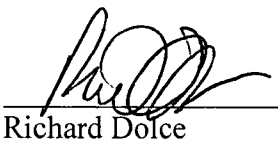

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CERTIFICATE OF COUNSEL

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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