

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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May 21 2020

SC Court of Appeals

APPEAL FROM AIKEN COUNTY
The Honorable Clifton B. Newman, Circuit Court Judge

Appellate Case Number 2019-001400

The State of South Carolina,

Appellant,

vs.

Herbert E. Pray, III,

Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

- I. The Circuit Court did not err in affirming the Magistrate Court's finding that the officer's reading of Respondent's Miranda rights after the officer departed the location of encounter, field sobriety tests, and arrest violated the requirements of what must be included on "The video recording at the incident site" as stated in section 56-5-2953(A) of the South Carolina Code.

STATEMENT OF THE CASE

On January 1, 2019, Respondent was arrested for driving under the influence (DUI). Respondent was issued a Uniform Traffic Ticket. (UTT; R. ____). Respondent filed a Motion to Dismiss his DUI charge in Magistrate Court on March 8, 2019 and asserted that the State failed to comply with the video statute, section 56-5-2953(A) of the South Carolina Code, by not reading Respondent his Miranda rights at the "incident site". (Motion to Dismiss; R. ____). The State filed a Response on March 12, 2019. (State's Response to Defendant's Motion; Magistrate's Return: R. ____).

On March 12, 2019, the Magistrate Court held a hearing on the Motion to Dismiss. Both parties stipulated at the hearing that the arresting trooper responded to a call at a particular address, where the trooper located Respondent, had Respondent perform field sobriety tests, arrested Respondent, and inventoried Respondent's vehicle, all video recorded and at the same location. (Transcript of Magistrate Court hearing p. 2, lines 3-45; Magistrate's Return; R. ____). The parties further stipulated that the arresting officer read Respondent his Miranda rights on video, but in the officer's moving vehicle, after departing the location above. (Transcript of Magistrate Court hearing p. 3, lines 1-19; Magistrate's Return; R. ____). The Magistrate dismissed the case based on a violation of the video recording statute. (Transcript of Magistrate Court hearing p. 9, lines 25-41; Magistrate's Return; R. ____).

On March 21, 2019, the State appealed the ruling to the Circuit Court. (Notice of Appeal and Appeal from Magistrate's Court; R. ____). The Magistrate filed her Return on March 25, 2019. (Magistrate's Return; R. ____). The Circuit Court held hearings on June 11 and 13, 2019. On August 9, 2019, the Circuit Court issued an order affirming the dismissal by the Magistrate. (Order on Appeal; R. ____). The State served its Notice of Appeal on August 16, 2019.

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court’s factual findings unless they are clearly erroneous. Id. On review, “the appellate court is limited to determining whether the trial judge abused his discretion,” State v. Garris, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Cl. App. 2011). “An abuse of discretion occurs when the court’s decision is unsupported by the evidence or controlled by an error of law”. Id.

STATEMENT OF FACTS

Trooper Singletary responded to call at a residential address. When the Trooper arrived to that address, he made his first contact with Respondent. (Dash Camera Video). After discussion with Respondent, the trooper administered field sobriety test on Respondent. (Dash Camera Video). As stipulated at the Magistrate's Court hearing, Respondent was placed under arrest 22 minutes and 50 seconds into the Dash Camera Video, but Respondent was not read his Miranda rights at that time. (Dash Camera Video). Once Respondent was placed under arrest, Trooper Singletary questioned Respondent regarding his preference of a towing company and whether Respondent had been previously arrested for DUI, eliciting verbal responses from Respondent. (Dash Camera Video). All the above was captured on the Trooper's forward-facing dash camera.

At approximately 27 minutes and 50 seconds into the video, Respondent was placed in the front seat of the Trooper's patrol car. (Dash Camera Video) At this point, Respondent was being video and audio recorded by the trooper's rear-facing dash camera, which had been turned on to record contemporaneously with the forward-facing dash camera. (Dash Camera Video). At 28 minutes and 19 seconds into the video, prior to searching Respondent's vehicle, the trooper questioned Respondent if there was anything illegal in Respondent's vehicle, including open containers or drugs, and Respondent gave verbal responses to this questioning. (Dash Camera Video).

The trooper proceeded to search Respondent's vehicle. (Dash Camera Video) After he discovered what he believed to be an open container of wine, the trooper questioned Respondent as to the contents of the container, eliciting further verbal response from Respondent. (Dash Camera Video). At 39 minutes into the Dash Camera Video, and approximately 16 minutes and 10 seconds after Respondent was placed under arrest, the trooper departed the location where

everything described above occurred. (Dash Camera Video).

While in the trooper's moving vehicle, Respondent continued to have conversation with the Trooper, with the dash camera still recording. (Dash Camera Video). 40 minutes and 49 seconds into the video, Respondent asked the trooper if he was being arrested, which prompted and reminded the trooper to read the Respondent his Miranda rights, for the first time during the entire interaction. (Dash Camera Video). The trooper then read Respondent his Miranda rights at 40 minutes and 54 seconds into the video, after almost two minutes of driving away from the incident site, more than 18 minutes after Respondent was arrested, and after asking Respondent numerous questions both specifically about the allegation of DUI as well as other, general questions. (Dash Camera Video).

ARGUMENT

- I. The Circuit Court did not err in affirming the Magistrate Court's finding that the officer's reading of Respondent's Miranda rights after the officer departed the location of encounter, field sobriety tests, and arrest violated the requirements of what must be included on "The video recording at the incident site" as stated in section 56-5-2953(A) of the South Carolina Code.

The Circuit Court correctly affirmed the Magistrate Court's dismissal of the DUI charge based on the determination that the State failed to comply with section 56-5-2953(A). First, both courts correctly held that section 56-5-2953(A) requires the arresting officer to read to Respondent his Miranda rights at the incident site, and that the incident site is the location where Respondent was located by law enforcement, performed field sobriety tests, and was subsequently arrested. Second, both courts correctly determined that failure to comply with the requirements of section 56-5-2953 required the dismissal of the DUI charge. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007); The Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278, (2011); State v. Johnson, 396 S.C. 182, 720 S.E.2d 516 (Ct. App. 2011). At no point has Appellant argued that the arresting officer's non-compliance with the statute was mitigated by any of the exceptions included in the statute, or that dismissal of the charge was not appropriate if there was a violation of the requirements of section 56-5-2953.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009); Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). In doing so, we must give the words found in the statute their "plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Sloan, 371 S.C. at 499. Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of

statutory interpretation are not needed and the court has no right to impose another meaning. Gay v. Ariail, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009). "When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant." Town of Mt. Pleasant v. Roberts, 393 S.C. at 342. Criminal statutes must be strictly construed against the State and in favor of the defendant. State v. Castineria, 341 S.C. 619, 625-26 (Ct. App. 2000).

Pursuant to section 56-5-2953, a person charged with driving under the influence must have his conduct at the incident site and breath test site recorded as follows:

Section 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.

S.C. Code Ann. § 56-5-2953(Supp. 2014) (emphasis added). At issue in this case is whether the phrase "incident site" refers to a particular location, and whether the State must perform and record the actions listed under sections 56-5-2953 (A)(1)(a)(ii) to (iii) at that same location, or "incident site"

This Court has determined that section 56-5-2953 serves two primary purposes. The first purpose is to create direct evidence of a DUI arrest by requiring the video include any field sobriety tests administered. State v. Taylor, 411 S.C. 294, 306, 768 S.E.2d 71, 77 (Ct. App. 2014). The other purpose, which is relevant to the case at hand, is to protect the rights of the defendant by "requiring video recording of the person's arrest and of the officer issuing Miranda warnings." Id.

It is unambiguous that the arresting officer must produce two separate video recordings, one from the incident site as required in subsection (A)(1) and one from the breath test site as required in subsection (A)(2). It is also clear that each video must capture specific actions. The incident site video must include any field sobriety tests administered, the arrest of a person for DUI, and the person being advised of his Miranda rights. All the actions under the "incident site"

heading must be recorded, and plainly must all occur at a singular location. Otherwise, there would be no reason to group these required actions under the same heading. The phrases “incident site” and “breath test” site have an important purpose within the statute. These phrases direct arresting officers as to what must be recorded as well as where each task must be performed and recorded.

It is clear that the Legislature intended for the location of the arrest to be the same location where Miranda is read, absent specifically enumerated exceptions, as the two requirements are grouped not only under the same heading of incident site video requirements, but more importantly within the same sentence and within the same subsection, (A)(1)(a)(iii). Plainly and clearly, since they appear within the same sentence of (A)(1)(a)(iii), the Legislature intended to protect the accused’s rights by requiring that the accused be given the Miranda advisement as soon as possible after arrest.

Appellant contends that nothing is gained by interpreting the term “incident site” as a narrow location restriction on where certain events must occur. In making this argument, Appellant asserts that even if Trooper Singletary had advised Respondent of his Miranda rights where he was arrested, it would have created no different or more substantive evidence than what was created in the video actually provided. However, this position incorrectly focuses on the wrong objective of section 56-5-2953, which is creating direct evidence of a DUI arrest. Taylor, 411 S.C. at 306, 768 S.E.2d at 77. Instead, this case must be analyzed in light of the video statute’s other primary purpose, which is to protect the rights of the defendant. Id.

Appellant does not contend that dismissal of the charge is an improper remedy for unexcused noncompliance with section 56-5-2953, or that a subsection (B) exception mitigated the violation of subsection (A). Instead, Appellant contends that the trooper’s reading of Miranda

in the trooper's moving patrol vehicle, after departing the location where the trooper responded to the call, first made contact with Respondent, had Respondent perform field sobriety tests, and arrested Respondent, satisfies the requirements of the subsection (A)(1)(a) incident site video recording.

In arriving at this conclusion, Appellant argues that the phrases "incident site" and "breath test site" do not refer to particular locations, but merely differentiate one video from another- the "incident site" video required by subsection (A)(1)(a) from the "breath test site" video required by subsection (A)(2). Under Respondent's logic that "incident site" is meant to describe a particular video and is not meant to describe a location, the arresting officer could theoretically let the incident site video record indefinitely, and then bring the defendant back on camera days later to read Miranda and still be in compliance with section 56-5-2953. This would lead to an absurd result clearly not contemplated or intended by the Legislature and highlights the importance of giving "incident site" its only clear and plain meaning.

The word "incident" is defined as "a discrete occurrence or happening." Black's Law Dictionary 830 (9th ed. 2009). "Site" is defined as "A place or location; esp., a piece of property set aside for a specific use." Black's Law Dictionary 1513 (9th ed. 2009). "Incident" is clearly a singular word, as is "site", and the phrase "incident site" is ordinarily and plainly understood to refer to a single, specific location. Therefore, subsection (A)(1)(a)'s language that "the video recording at the incident site must:" unambiguously requires that all actions on the video recording from the incident site must occur at the same location.

If the Legislature did not intend for the term "incident site" to describe single location where the listed actions must be recorded, and only meant for the term to distinguish one video from another, they would have chosen a number of possible ways to differentiate between the

two required video recordings. Instead, however, the Legislature used the terms “incident site” and “breath test site” to describe where each recording must take place. The incident site is where the officer responds, encounters the driver, performs any field sobriety tests, arrests the driver, and where Miranda must be read.

Further, numerous forms prepared and completed by the State in this case also refer to this single, particular location. The incident site in this case is the same place as the “INCIDENT LOCATION” on the trooper’s own Incident Report. (Incident Report; June 13 Circuit Court Transcript p. 28, lines 15-20; R. ____). It is the same location as the “crime location” on the trooper’s Probable Cause Affidavit. (Probable Cause Affidavit; Magistrate’s Return; R. ____). It is the same location (but for a typographical error regarding the street number) as the trooper’s “VIOLATION LOCATION” on his Uniform Traffic Ticket. (UTT; R. ____). In fact, the Uniform Traffic Ticket includes latitude and longitude GPS coordinates under “VIOLATION LOCATION,” indicating with extreme precision that the incident took place at a single location. (UTT; R. ____). All of these documents indicate that the incident site or location refers to a specific place, which is: where the officer responded, where the officer administered field sobriety tests, and where the officer arrested Respondent- but **not** where the officer read Miranda in this case.

In the case at hand, Trooper Singletary was called to a residence in Aiken County regarding a possible DUI. (Incident Report; R. ____). The call was not in reference to a road block, traffic accident investigation, or citizen’s arrest, there were no issues with the video recording equipment, no emergency medical treatment was required, and no exigent circumstances existed, as contemplated by subsection (B) of section 56-5-2953.

The video in this case begins upon the activation of the trooper’s blue lights, and Appellant relies on this fact for the argument that “incident site” does not refer to a singular

location because officers normally initiate their blue lights while traveling in their vehicle and before arriving to a scene. Appellant argues that "incident site" is a broad term that can cover a span of distance, since the blue light language is included in the subsection (A) requirements regarding the incident site video. However, this argument is defeated by looking at the plain and unambiguous language of the statute. The statute does not read that the video recording at the incident site must "show" the officer's activation of the blue lights, instead it reads that the incident site video must "not begin later than the activation of the officer's blue lights." S.C. Code Ann. § 56-5-2953 (A)(1)(a)(i) (Supp. 2014). Therefore, the activation of blue lights does not mark the beginning of an indefinite incident, but instead tells the arresting officer when he must turn on his camera that will ultimately capture certain events must occur at the actual incident site.

Shortly after the trooper initiated his blue lights and began recording, he arrived at the incident site he was called to. After performing field sobriety tests, Respondent was arrested but not read Miranda. (Dash Camera Video). Respondent was then placed in the trooper's patrol vehicle, where the trooper proceeded to ask Respondent incriminating questions regarding any prior DUI arrests and the presence of any contraband in Respondent's vehicle. (Dash Camera Video). The trooper asks other questions that elicited verbal, audio and video recorded responses from Respondent, all without Respondent being read Miranda. (Dash Camera Video).

After searching Respondent's car, the Trooper then confronted and questioned Respondent regarding an open container of alcohol found in the car. (Dash Camera Video). Once the trooper departed the scene, Respondent asked the trooper if he was being arrested for DUI. (Dash Camera Video). Finally, after having been in custody for more than 18 minutes, after having been questioned about the alleged crime of DUI while in custody, after driving almost 2

minutes away from the location of encounter, field sobriety tests and arrest, and only after being prompted by Respondent, the trooper read his Miranda rights. (Dash Camera Video).

In the unique field of DUI arrests, defendants are secured in a patrol car after being arrested and often remain in the car for a period of time while the officer completes paperwork and then transports the defendant to jail. A driver charged with DUI can incriminate himself after arrest not only by answering questions about alcohol consumption and driving, but also by responding to any question, as the State routinely argues that a driver's speech, enunciation, and demeanor are evidence of intoxication.

Respondent's rights were not adequately protected in this case as the Legislature intended for them to be when drafting section 56-5-2953. Respondent was already in custody and was then induced into incriminating himself by being questioned not only specifically about an open container, but also generally about prior DUI charges and towing preference by the trooper, all without a prior Miranda warning. Although the violation of the Miranda requirement of section 56-5-2953 was likely not intentional by the trooper, the violation occurred nonetheless.

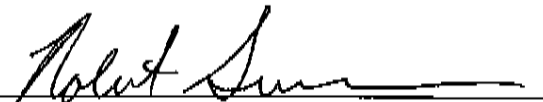
It is true that field sobriety tests are not always performed, video equipment sometimes fails despite reasonable maintenance efforts, and in the case of a traffic accident or other limited circumstances, a driver is not always arrested at the incident site. However, the Legislature has provided an exception to the video requirements of section 56-5-2953. In this case, none of those exceptions apply and none were raised by Appellant.

Accordingly, this Court should apply the unambiguous, plain and clear meaning of "incident site" and decide that the lower court was correct in affirming the trial court's dismissal of the charge due to the State's unexcused violation of § 56-5-2953.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Circuit Court affirming the Magistrate Court's dismissal of the case should be AFFIRMED and this case DISMISSED.

Respectfully submitted



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May 21, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
The Honorable Clifton B. Newman, Circuit Court Judge

Appellate Case Number 2019-001400

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The State of South Carolina,

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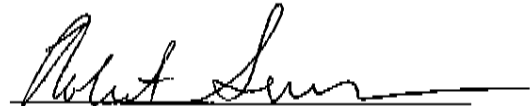
I, Robert I. Sussman, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by having three copies delivered to:

Alan Wilson
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William M. Blich, Jr.
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J. Strom Thurmond
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I further certify that all parties required by Rule to be served have been served.
This 21st day of May, 2020



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LETTER TO THE APPELLATE COURT CLERK

May 21, 2020

VIA FACSIMILE: 803-734-1839

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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RECEIVED

May 21 2020

SC Court of Appeals

RE: State of South Carolina, Appellant v. Herbert E. Pray, III, Respondent
Civil Action No.: 2019-CP-02-00690
Appellate Case No.: 2019-001400

Dear Ms. Kitchings:

Enclosed for filing is a copy of the Initial Brief of Respondent and Designation of Matter, with a Proof of Service. If I can provide anything further, please do not hesitate to contact me.

Sincerely,



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enclosure

cc: William M. Blich, Jr. (w/ enclosure)
J. Strom Thurmond, Jr. (w/enclosure)

