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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2018-002242

THE STATE, ...RESPONDENT,

v.

PHILLIP WAYNE LOWERY,.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

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II. The trial judge properly denied the motion to dismiss Appellant's charge where the dashcam video recording depicted the issuing of Miranda warnings to Appellant, but those warnings were not played for the jury due to technical issues with the edited dashcam video. Further, the recording statute does not require jurors actually view the issuing of Miranda warnings, which are irrelevant to the non-custodial statements made by Appellant and shown in the recording.

STATEMENT OF THE CASE

On June 5, 2018, Appellant was indicted by the Greenville County Grand Jury for driving under the influence. On December 12–13, 2018, Appellant proceeded to a jury trial before the Honorable Robin B. Stilwell. Assistant Solicitor Brann Fowler, Esquire, represented the State; J. Max Gravlee, Esquire, represented Appellant. The jury found Appellant guilty as charged and the trial judge sentenced him to two years' incarceration.

Appellant timely filed a notice of appeal and brief. This brief of Respondent now follows.

STATEMENT OF FACTS

Prior to trial, a Jackson v. Denno[2] hearing was held for the State's two testifying witnesses: Troopers David Vallin and Brandon McNeely with the South Carolina Department of Public Safety. Trooper Vallin testified that on night of Appellant's arrest, he had responded to a call about a car accident.[3] A short distance from the accident, officers located a vehicle with front-end damage at a Spinx gas station and Trooper Vallin arrived at the location after a few other officers. There, they found Appellant outside of the vehicle in question. Trooper Vallin turned on his dashboard camera, approached Appellant, and asked him about the vehicle; particularly, whether he was its driver. At that point, Trooper Vallin's sole objective was to determine whether Appellant and/or the vehicle were involved in the accident and who was at fault in said accident, and even stated such. As Trooper Vallin began speaking with him, Appellant quickly made several incriminating statements; notably, he initially claimed he turned into the gas station to change a flat tire but then stated he "guess [he] screwed up," he could not lie, and "[i]f [he] hit anybody [he was] sorry." (Tr.p.32, line 20–Tr.p.37, line 15; State's Exhibit 1)

On cross-examination, Trooper Vallin testified that once questioning of Appellant began, he was not free to leave and that he did not tell Appellant he was free to termination the interrogation at that point. Further, other officers were in the immediate vicinity around the men. However, Appellant was not in handcuffs at that time. (Tr.p.38, line 6–Tr.p.42, line 25)

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[2] Jackson v. Denno, 378 U.S. 368 (1964)

[3] The original incident was a hit-and-run. Because Appellant's involvement in that incident was not the subject of Appellant's trial, the trial judge limited reference to that incident as an accident. (Tr.p.33, line 5–Tr.p.34, line 5)

Trial counsel objected to the admission, claiming that pursuant to Jackson v. Denno, arguing that Appellant's statements were made during a custodial interrogation and, because he was not given Miranda warnings, they were inadmissible. Trial counsel further argued that because Appellant was formally placed under arrest later, it was "clear" he was under arrest at that time. Trial counsel also claimed that Trooper Vallin's testimony, which indicated Appellant was not free to leave the scene, further supported his position. The State disagreed, and pointed to the Supreme Court of South Carolina's opinion in State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984), in which it found Miranda warnings were not required when officers questioned persons during a "routine investigation" of a traffic accident. The State noted Trooper Vallin asked basic questions of Appellant in an effort to ascertain who or what caused the initial traffic accident, during which Appellant volunteered his inculpatory statements. (Tr.p.43, line 2–Tr.p.47, line 6)

The trial judge ultimately concluded that Officer Vallin's recording, and Appellant's inculpatory statements within, were generally admissible. Based on his review of the testimony and the recording, the trial judge found Appellant was not in custody at the time he was questioned and volunteered his incriminating. The trial judge further found Trooper Vallin's questions were "fairly innocuous" and focused on the traffic accident, pursuant to a routine investigation. Thus, Trooper Vallin's actions fell within those "contemplated in the [Morgan] case." (Tr.p.47, line 7–Tr.p.48, line 11)

However, after hearing trial counsel's concerns regarding the characterization of the car accident within the recording, the trial counsel instructed the parties to redact the portions of the recording which unnecessarily discussed the earlier traffic incident. The trial judge made it clear that he wanted to parties to discuss any and all issues with the video recording and other

evidence in the case, including the separate recording of Appellant's sobriety tests, and send him an email before the trial began in earnest the following day. (Tr.p.48, line 12–Tr.p.57, line 16; Tr.p.64, lines 3–23; Tr.p.72, line 14–Tr.p.75, line 15)

The following day, the trial began. Neither party had any objections when the State began presenting its evidence. (Tr.p.76, lines 1–19)

Trooper McNeely testified that he arrived at the Spinx sometime after Trooper Vallin. When he arrived, he immediately noticed signs of impairment from Appellant such as the great effort it took him to even stand. Trooper McNeely offered Appellant the chance to demonstrate he was not intoxicated by participating in the standardized field sobriety test. During the first procedure, the horizontal nystagmus test, Appellant was unable to focus his eyes on Trooper McNeely's finger and follow it through a range of motions. When Appellant participated in the second exercise, the walk and turn test, during which Appellant struggled to walk in a line and to follow Trooper McNeely's oral commands. The third and final test, the one-legged stand, required Appellant to stand on the leg of his choosing and maintain balance for thirty seconds while verbally counting the time. Again, like with the first two tests, Appellant struggled greatly when attempting the task. The results of these three tests, combined with Appellant's drunken demeanor, alcoholic odor, and urination on himself became the basis upon which Trooper McNeely arrested him. Through Trooper McNeely's testimony, the State admitted the dashboard camera recording of the tests he performed on Appellant along with the conversation between the two men. When the trial court, sua sponte, asked trial counsel whether he had an objections to this recording, trial counsel had no objection provided the agreed redactions were performed on it. (Tr.p.89, line 24–Tr.p.99, line 2; State's Exhibit 2)

Trooper McNeely then testified that after Appellant was arrested and placed in handcuffs, he issued him Miranda warnings. However, when Appellant tried to play that portion of the recording, the State requested an off-the-record bench conference. When the parties returned, the trial judged announced the State was having technical difficulties with playing that portion of the recording. However, Trooper McNeely confirmed that the video did record and show him providing Appellant with his Miranda warnings. Trial counsel did not lodge any objection to playing the recording despite the State's inability to display the portion showing the Miranda warnings. (Tr.p.99, line 4–Tr.p.100, line 7)

After the State rested its case, trial counsel moved for a directed verdict of not guilty, claiming the State failed to provide evidence, other than Appellant's own self-incriminating statements about driving the car, that the car had been driven by Appellant that night; none of the officers saw Appellant driving car and no one checked to see whether "the car was warm." The State responded that Appellant himself admitted to driving the vehicle, which was more than enough evidence to support a denial of the motion. The trial judge agreed with the State and denied the motion. Again, no objection relating to the admission of Trooper McNeely's recording was made by trial counsel. (Tr.p.104, line 8–Tr.p.105, line 10; Tr.p.108, line 4–Tr.p.113, line 15)

After the defense presented its case, trial counsel again moved for a directed verdict. This time, however, the basis for Appellant's motion was the failure to play the portion of Trooper McNeely's recording which showed him issuing the Miranda warnings. Trial counsel claimed he did not object previously because he did not know how the video was "going to play out" and did not know what was on the video and what could or could not be played. Trial counsel maintained that the DUI statute required that the issuance of Miranda warnings be

recorded and such recording needs to be shown to the trier of fact. (Tr.p.141, line 20–Tr.p.142, line 15)

In response, the State noted that the recording issue was addressed at bar, on the record, just shortly before. The State noted that it, along with trial counsel, redacted that video together the night before to ensure the parties complied with the trial judge's pretrial rulings and Appellant knew the Miranda warnings were contained in the recording. The trial judge denied the motion, noting the State "substantially complied" with the requirements of the recording statute. (Tr.p.142, line 16–Tr.p.143, line 3)

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a statement will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998). "[T]he appellate court does not re-evaluate the facts based upon its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2008).

ANALYSIS

I.

The trial judge properly allowed the State to introduce evidence of Appellant's incriminating statements because they were not made during a custodial interrogation, but during a routine traffic stop which did not require Miranda warnings.

Appellant argues the trial judge erred in allowing the State to introduce Appellant's incriminating statements in which he, among other things, admitted to driving his vehicle that night. The State disagrees with this allegation of error. Appellant's statements were non-custodial and made during a routine traffic investigation by officers. Accordingly, they were properly admissible as evidence at trial.

Miranda warnings are designed to protect several constitutional rights of an accused, most importantly, the privilege against self-incrimination. State v. Howard, 296 S.C. 481, 374 S.E.2d 284 (1988). In order to assure that an accused's right to remain silent is not compromised during custodial interrogation, the United States Supreme Court ruled that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." Miranda v. Arizona, 384 U.S. 436, 444 (1966). "A statement, whether exculpatory or inculpatory, obtained as a result of custodial interrogation is inadmissible unless the person was advised of and voluntarily waived his rights under Miranda . . . ." State v. Kennedy, 325 S.C. 295, 302, 479 S.E.2d 838, 842 (Ct. App. 1996) aff'd as modified, 333 S.C. 426, 510 S.E.2d 714 (1998).

The special procedural safeguards outlined in Miranda are not required if a suspect is simply taken into custody, but only if a suspect in custody is subjected to interrogation. Id., at, 303, 479 S.E.2d at, 842 (Ct. App. 1996) aff'd as modified, 333 S.C. 426, 510 S.E.2d 714 (1998).

The interrogation requirement of Miranda is met by express questioning or its functional equivalent, and includes words or actions the police should know are reasonably likely to elicit incriminating responses from a criminal suspect. Rhode Island v. Innis, 446 U.S. 291 (1980); State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989); Kennedy, 333 S.C. at 426, 510 S.E.2d at 714. Volunteered statements not made in response to custodial interrogation do not require Miranda warnings. Arizona v. Mauro, 481 U.S. 520 (1987). Miranda warnings are inapplicable to volunteered statements not the product of interrogation. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989). In Howard, the court stated:

> In formulating a definition of interrogation, the [Innis] Court pointed out that "the concern of the Court in Miranda was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." The Court noted that interrogation must reflect a measure of compulsion above and beyond that inherent in custody itself.

296 S.C. at 488, 374 S.E.2d at 288 (emphasis added).

Notably, courts have repeatedly found that the questioning of a motorist during a routine traffic stop is not considered "custodial interrogation" for the purposes of Miranda. In Berkemer v. McCarty, 468 U.S. 420 (1984), the United States Supreme Court held that a traffic stop, although considered a "seizure" pursuant to the Fourth Amendment, was not a situation considered unduly coercive which required the issuing of Miranda warnings to a seized person for two primary reasons: (1) detention of a motorist during a traffic stop is "presumptively temporary and brief" and a motorist expects that he or she will most likely be allowed to continue on his or her way, a situation drastically different from an interrogation at a police station which is presumptively long and will continue until the individual provides interrogators with the information they seek; and (2) circumstances associated with a typical traffic stop are

not such that the motorist feels he or she is "completely at the mercy of the police" because the public location of such detainment, which allows for the presence of witnesses and passing motorists "reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse." Id. at 437–39.

Due to these two important factors, the Berkemer court found routine traffic stops to be analogous to Terry stops which allow officers to investigate individuals and circumstances which "provoke suspicion" by asking a detained individual a "moderate number of questions" to determine identity and obtain information proving or dispelling an officer's suspicions. Notably, a detainee is only arrested in such situations if his or her answers provide an officer with problem cause to initiate the arrest. Id. at 439.

In Morgan, the Supreme Court of South Carolina cited with approval to Berkemer and its ruling that routine investigation into the cause of a traffic accident, and a defendant's statements made during such investigation, were not custodial interrogations requiring Miranda warnings. Id. at 411–12, 319 S.E.2d 336–37. In State v. Peele, 298 S.C. 63, 378 S.E.2d 254 (1989), the Supreme Court, citing to both Berkemer and Morgan, specifically stated sobriety tests performed during routine traffic stops were non-custodial interrogations which did not require the issuance of Miranda warnings. Id. at 64–66, 378 S.E.2d at 255–56.

In the instant case, Appellant's questioning by police officers was not a "custodial interrogation" requiring Miranda warnings. Just because Appellant was not free to leave while he was being questioned does not convert the traffic stop into a custodial interrogation; notably, every traffic stop involves some detention. When stopped by police, motorists must pull over and answer questions from police before being allowed to continue on their way. Notably,

Appellant's questioning by police occurred in an even less-intrusive setting that most traffic stops: (1) Officer Vallin did not "stop" Appellant, Appellant chose to stop at the gas station without any involvement from police; and (2) the questioning took place in the parking lot of the gas station, a much more "public" place than the side of a road.

Further, Officer Vallin's intent to, eventually, arrest Appellant is a non-factor in determing both whether Appellant was in a custodial interrogation or the voluntariness of his statements: the Berkemer court specifically noted "[a] policeman's unarticulated plan has no bearing on the question of whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Id. at 468 U.S. at 442. As noted above, Appellant chose to spoke to officers in a public place after he, of his own volition, pulled his car into the gas station. Officer Vallin never informed Appellant he was under arrest until after he had performed poorly during his field sobriety tests. Accordingly, the trial judge properly admitted Appellant's incriminating statements into evidence.

Public Safety Exception

Should the court conclude the statements made by Appellant were interrogative in nature, the State submits the questions fall within the public safety exception to Miranda delineated in New York v. Quarles, 467 U.S. 649 (1984). In Quarles, a woman approached two police officers who were on road patrol and told them that she had just been raped. Id. at 649. The victim described her assailant, and told them that the man had just entered a nearby supermarket and was carrying a gun. Id. While one of the officers radioed for assistance, the other entered the store and saw the defendant, who ran toward the rear of the store. Id. The officer pursued him but lost sight of him for several seconds. Id. Upon apprehending the defendant, the officer frisked him and discovered that he was wearing an empty shoulder holster. Id. After handcuffing him,

the officer asked him where the gun was. Id. Defendant nodded toward some empty cartons and responded that "the gun is over there." Id. The officer then retrieved the gun from one of the cartons, formally arrested respondent, and read him his Miranda rights. Id. The court created a public safety exception to the Miranda warnings, saying:

> [T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

Id. at 657.

The trial court judge applied this reasoning in the instant case. Officers were investigating a serious car accident in which the second vehicle fled the scene. Just over a mile away from the scene of the accident, officers found a badly damaged vehicle which appeared to be the vehicle which fled that scene. Officers needed to find the driver and other potential occupants of the vehicle due to the potential injuries by those in car and for the possibility that the driver of the vehicle may try to operate the vehicle again, which due to his own impairment or the existing damage to the vehicle, could cause additional accidents or harm. As soon as officers began questioning Appellant, the officers had good reason to believe he was under the influence of some intoxicant, but they did not know the nature or the amount of the substance Appellant consumed. For his safety, and for those of the bystanders around them, the officers needed to assess the volatile situation quickly. Thus, should the Court find Appellant's initial questioning

was asked during a custodial interrogation, the question and its incriminating response falls within the narrow public safety exception to Miranda, and is thereby admissible.

II.

The trial judge properly denied the motion to dismiss Appellant's charge where the dashcam video recording depicted the issuing of Miranda warnings to Appellant, but those warnings were not played for the jury due to technical issues with the edited dashcam video. Further, the recording statute does not require jurors actually view the issuing of Miranda warnings, which are irrelevant to the non-custodial statements made by Appellant and shown in the recording.

Appellant claims the trial judge erred in denying his motion to dismiss his charges because the recording of the traffic stop did not show the officers issuing Miranda warnings to him. The State disagrees with this allegation of error for several reasons. First, the video did, in fact, contain the relevant Miranda warnings, but those warnings were not shown to the jury; nothing in the relevant Statutes require that the jury see the issuing of Miranda warnings. Furthermore, the evidence submitted on that second recording, mainly Appellant's performance during field sobriety testing, was non-custodial in nature and did not require any prior Miranda warnings. Finally, S.C. Code Ann. § 56-5-2953(B) gives judges the discretion to "consider[] any other valid reason for the failure to produce the video recording based upon the totality of the circumstances," and the technical difficulties acknowledged by the trial judge and the parties is a more-than-adequate justification for the State's failure to play that portion of the video to the jury.

Pursuant to S.C. Code Ann. § 56-5-2930(A):

> It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, 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 a motor vehicle are materially and appreciably impaired, or 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 a motor vehicle are materially and appreciably impaired.

(Supp. 2014).

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.**
>
> . . .
>
> (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(A)–(B) (Supp. 2014) (emphasis added).

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). "The statute must be interpreted with realistic circumstances and rationales in mind." State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011)(emphasis added); 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. . . .").

"[T]he primary intention 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." Elwell, 396 S.C. at 336, 721 S.E.2d at 454. This 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).

Initially, the State notes nothing in §§ 56-5-2930 or 56-5-2953 requires that the jury actually be shown the issuance of Miranda warnings to a defendant; the presence of the Miranda warnings is solely related to whether the trial judge should admit the video into evidence and is not included as an element of the offense defined with S.C. Code Ann. § 56-5-2930. In fact, § 56-5-2930(J)(3) specifically allows for "a video recording of the person's conduct at the incident site and breath testing site taken pursuant Section 56-5-2953 . . . **subject to redaction under the South Carolina Rules of Evidence.**" (emphasis added). Notably, the parties and trial judge all knew the Miranda warnings were present on the original and edited recordings. In fact, trial counsel participated in the redaction of the videos with the State to ensure they complied with the requirements set forth by the trial judge, and the copies of the recording currently possessed by the parties all contain the portion of the video in which Appellant is given Miranda warnings. It would be an extreme act to reverse Appellant's conviction when the recording of his sobriety tests complied with the letter of the law. Further, it is counterintuitive to exclude the use of **non-custodial** statements made by Appellant based solely on the presence of Miranda warnings, a requirement for **custodial** statements.

Appellant claims that failure to play the portion of the video including the Miranda warnings to the jury is problematic for Appellant's conviction because "[i]t is not possible to determine if Appellant actually heard and understood his Miranda rights." (Br. of Appellant p.11). What Appellant fails to recognize is this very statement illustrates why the presence of Miranda warnings was unimportant to the jury's deliberations: Miranda warnings were not required to be given to Appellant before Officer McNeely conducted the field sobriety tests because, as explained supra in Issue I, field sobriety testing is not considered "custodial interrogation" for the purposes of Miranda. See, e.g., Peele, 298 S.C. at 64–66, 378 S.E.2d at 255–56. In fact, field sobriety testing is an important factor in determining whether probable cause exists for an arrest for driving while intoxicated. See Lapp v. SCDMV, 387 S.C. 500, 505–06, 692 S.E.2d 565, 568–69. (Ct. App. 2010).

The trial judge and the parties all acknowledged that the reason the jury was unable to view the recorded Miranda warnings was due to technical difficulties with the redacted video. The technical issues were in no way attributed to the State's handling of the recording. Further, it is undisputed that the unedited version of the recording depicts an officer giving Appellant his Miranda warnings. Accordingly, the trial judge did not err in admitting the evidence of Appellant's field sobriety testing and finding the circumstances justified denial of Appellant's motion.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

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May 22, 2020

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2018-002242

THE STATE, ...RESPONDENT,

v.

PHILLIP WAYNE LOWERY,.....APPELLANT.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by email to the address listed in AIS and with a copy of the same to follow in the United States mail, postage prepaid, addressed to:

Taylor D. Gilliam, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served this 22nd day of May, 2020.

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Caroline Collins

From: Caroline Collins
Sent: Friday, May 22, 2020 11:49 AM
To: 'tgilliam@sccid.sc.gov'
Cc: 'Allgire, Mary'; William Blitch; Bill Schumacher
Subject: The State v. Phillip Wayne Lowery (2018-002242)
Attachments: LOWERY Phillip - Cover Letter - IBOR and DOM (02284723xD2C78).PDF; LOWERY Phillip - Initial Brief of Respondent and Designation of Matter - 2018-002242 (02284726xD2C78).PDF

Good Morning Mr. Gilliam,

Attached please find a copy of the initial Brief of Respondent and Designation of Matter in The State v. Phillip Wayne Lowery (2018-002242), along with its cover letter. These documents will be submitted to the Court of Appeals through the AIS system. As written in the certificate of service, in addition to this email a hard copy of these documents has been deposited in today's mail.

If you will, please reply to confirm receipt of this email.

Thank you!

Caroline Collins
Administrative Coordinator
South Carolina Attorney General's Office
P: (803) 734-3723