

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Greenville County

SC Court of Appeals

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILLIP WAYNE LOWERY,

APPELLANT

APPELLATE CASE NO 2018-002242

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE.....2

ARGUMENT

I.

The trial court erred in admitting Appellant’s statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily, where law enforcement would not let him use the restroom and admitted he was not free to leave.....3

II.

The trial court erred in failing to dismiss Appellant’s charge, where the dashcam video failed to comply with the driving under the influence statute and did not include all of the field sobriety tests administered or any of the officers reading Appellant his Miranda rights.10

CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)..... 9

California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517 L.Ed.2d 1275 (1983)..... 9

Maryland v. Shatzer, 559 U.S. 98, 112, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010) 8

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 7

Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711 L.Ed.2d 714 (1977)..... 9

State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013)..... 3

City of Rock Hill v. Suchenski, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007)..... 11

State v. Caulder, 287 S.C. 507, 339 S.E.2d 876 (Ct.App.1986)..... 8

State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003)..... 8

State v. Garris, 394 S.C. 336, 714 S.E.2d 888 (Ct. App. 2011)..... 10

State v. Kennedy, 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1996)..... 7

State v. Kinard, 427 S.C. 367, 831 S.E.2d 138 (Ct. App. 2019) 11

State v. Ledford, 351 S.C. 83, 567 S.E.2d 904 (Ct. App. 2002)..... 7

State v. Medley, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016) 9

State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010). 7

State v. Neely, 271 S.C. 33, 40, 244 S.E.2d 522, 526 (1978)..... 8

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006)..... 3

State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013)..... 6

State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011)..... 3

Statutes

S.C. Code Ann. § 56-5-2930..... 10

S.C. Code Ann. § 56-5-2953..... 10, 11

STATEMENT OF ISSUE ON APPEAL

I. Did the trial court err in admitting Appellant's statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily, where law enforcement would not let him use the restroom and admitted he was not free to leave?

II. Did the trial court err in failing to dismiss Appellant's charge, where the dashcam video failed to comply with the driving under the influence statute and did not include all of the field sobriety tests administered or any of the officers reading Appellant his Miranda rights?

STATEMENT OF THE CASE

Appellant was indicted by a Greenville County grand jury on June 5, 2018 for driving under the influence. R. 152. He proceeded to trial before the Honorable Robin B. Stilwell and a jury on December 12, 2018. J. Max Gravlee represented Appellant; Brann Fowler appeared on behalf of the state. R. 1. After a two-day trial, the jury found Appellant guilty. R. 144, ll. 1 – 8. Judge Stilwell sentenced Appellant to two years' incarceration.

This appeal follows.

ARGUMENT

I. The trial court erred in admitting Appellant’s statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily, where law enforcement would not let him use the restroom and admitted he was not free to leave.

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (“quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “ An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

Neither of the two witnesses called by the state at Appellant’s trial observed him driving a car at any point on the night he was arrested. David Vallin, an officer with the South Carolina Highway Patrol, could not remember vital details from the night, January 26, 2018. R. 102, l. 6 – R. 104, l. 21. During direct examination, he could not recall whether Appellant was inside or around his daughter’s car, a red SUV, in a gas station parking lot when law enforcement arrived. Id. He was likewise unsure whether Appellant even had keys to the car at the time. Id. The state admitted the dashcam video from Vallin’s car as an exhibit, and it was published to the jury. R. 105, l. 20 – R. 107, l. 5; State’s Exhibit 1.

Vallin, who had been a trooper for approximately three years at the time of Appellant's trial, did not prepare an incident report. R. 110, l. 22 – R. 112, l. 15. Additionally, he did not take any photographs or write down any notes. Id.

Brandon McNeely was the state's only other witness. At the time of trial, he had been with the South Carolina Highway Patrol for almost two years. R. 115, ll. 1 – 16. Like Vallin, he arrived at the gas station parking lot on January 26, 2018. Id. McNeely remarked that the gas station had outdoor cameras and that he neglected to even consider obtaining that footage. R. 123, ll. 15 – 24.

The video from McNeely's car was admitted as State's Exhibit 2 and published to the jury. R. 119, l. 21 – R. 121, l. 6; State's Exhibit 2. McNeely indicated that Appellant showed signs of impairment. R. 121, ll. 8 – 20. Appellant also urinated on himself. R. 122, ll. 18 – 24. McNeely arrested Appellant and then read him his Miranda rights. R. 123, l. 25 – R. 124, l. 8.

McNeely freely admitted that Appellant was not allowed to use the restroom. Appellant twice urinated on himself because law enforcement refused to allow him to use the restroom. R. 77, l. 15 – R. 78, l. 8. McNeely suggested that he was investigating a crime at the time when Appellant said he needed to use the restroom. R. 78, ll. 18 – 24. He candidly disclosed that Appellant was the subject of the investigation. Id.

After offering the testimony of Vallin and McNeely, the state rested. R. 79, ll. 8 – 10. Appellant moved for a directed verdict on the grounds that the state failed to prove the *corpus delicti* in the case. R. 83, l. 4 – R. 85, l. 20. He argued that neither trooper witnessed Appellant or anyone else driving the red SUV, that there was no testimony regarding scrape marks or the temperature of the car, and that there was no proof Appellant had been driving.

The assistant solicitor opined, in response, that Appellant’s statement from the dashcam videos was “excellent evidence and certainly enough for a jury question as to whether or not he was driving.” R. 85, l. 23 – R. 86, l. 20. The trial judge denied Appellant’s motion for a directed verdict. R. 87, l. 16 – R. 88, l. 11.

Discussion

Vallin testified *in camera* at a Jackson v. Denno¹ hearing. He claimed to have received a call from the Greenville County Sheriff’s Office “saying that they believe that they had located” a car, in a Spinx parking lot, which they contended had left the scene of an accident. R. 8, ll. 8 – 15. Vallin plainly admitted to questioning Appellant near the red SUV in the Spinx parking lot after he arrived. R. 9, ll. 7 – 22. Vallin indicated that “maybe three or four” other officers were nearby at the time of the questioning. All were in uniform and armed. R. 13, ll. 8 – 23. The blue lights from officers’ cars were flashing. R. 14, ll. 18 – 20. Appellant was not handcuffed at the time, but he was not free to leave. R. 10, ll. 3 – 25. Vallin claimed that his questioning of Appellant was part of an investigation into a car accident. Id.

If Appellant had attempted to leave, law enforcement officers would have used to force to restrain him; he was not allowed to leave. R. 15, ll. 2 – 21. Vallin never advised Appellant that he could leave or that he was free to terminate the interrogation at any point. Id. During the questioning, Appellant inquired if he would be allowed to call someone; he was told no. R. 15, ll. 2 – 14. Vallin believed Appellant was involved in the prior collision. Id. Notably, Vallin admitted that the answers Appellant gave, coupled with the tests he was given at the scene, led to Appellant’s arrest. R. 16, ll. 18 – 22.

¹ 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

Counsel for Appellant correctly argued that Appellant was in custody and should have been notified of his rights:

Your Honor, I believe this [is] a plain, clear custodial interrogation. He's not free to leave, that was directly from the trooper's mouth. He said he couldn't leave. Said if he ran away they would have apprehended him, made sure that he would have [to] stand there. I'm not sure how much [more] custodial [that] can be.

R. 18, l. 11 – R. 21, l. 4. Counsel cited State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013) and requested that Appellant's statement be suppressed. The assistant solicitor suggested that the officers were investigating the accident. R. 21, l. 6 – R. 22, l. 6.

The trial judge found the statements and dashcam videos to be admissible. R. 22, l. 7 – R. 23, l. 10. The court found “objectively that he was not in custody at the time.” Id.

Counsel for Appellant successfully argued that the state's witnesses should not refer to the accident; the trial judge ruled that any references to the prior accident were inadmissible unless the other party from the accident testified. R. 26, ll. 7 – 18; R. 31 ll. 19 – 23. As such, the trial court questioned how the state was going to establish driving, and the assistant solicitor divulged the importance of Appellant's statement in the video:

Judge, in relative part to that video right there, the Defendant said, I left wild country the bar. I pulled in here, I was the only person in the car. I was turning in here to get something to eat. I was turning in here to change my tire. I guess I screwed up, I can't lie. If I hit anybody I'm sorry.

And that would be, you know, pretty essential part of my evidence. I understand where [defense counsel] is coming from and I'm not trying to try a hit and run or a traffic wreck case here by any means.

R. 25, ll. 16 – 1.

In Jackson v. Denno 378 U.S. 368, 376 (1964), the United States Supreme Court indicated “that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or

falsity of the confession.” Accordingly, a defendant has the right to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness. Id. at 376–77. “In order to introduce into evidence a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).” State v. Moses, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010).

The state may not use statements stemming from custodial interrogations of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege of self-incrimination. Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, (1966). Custodial interrogation entails questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Id. Interrogation can be either express questioning or its functional equivalent and includes words or actions on the part of police (other than those normally attendant to arrest and custody) the police should know are reasonably likely to elicit an incriminating response. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996), aff’d as modified, 333 S.C. 426, 510 S.E.2d 714 (1998).

Whether a suspect was in “custody is determined by an objective analysis of ‘whether a reasonable man in the suspect's position would have understood himself to be in custody.’ ”

State v. Ledford, 351 S.C. 83, 88, 567 S.E.2d 904, 907 (Ct. App. 2002). “To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning.” State v. Evans, 354 S.C. 579, 583, 582

S.E.2d 407, 410 (2003). A person is “in custody” when a person's freedom has been restricted. State v. Caulder, 287 S.C. 507, 515, 339 S.E.2d 876, 881 (Ct.App.1986).

The Miranda warnings are not required if the defendant is not in custody or significantly deprived of his freedom. State v. Neely, 271 S.C. 33, 40, 244 S.E.2d 522, 526 (1978). To determine whether a suspect was in custody for the purposes of Miranda, the Supreme Court has asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Maryland v. Shatzer, 559 U.S. 98, 112, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010).

In Morgan v. State, Robert Morgan and a man named Dotson returned to the scene of an accident in a Camaro after the Mustang they were racing wrecked. 282 S.C. 409, 410, 319 S.E.2d 335, 336 (1984). The Camaro was not involved in the accident, but Morgan admitted to having driven it. Id. He also admitted to using alcohol and marijuana. Id. He was not given any Miranda warnings. Id. Morgan’s statements, the only evidence that he had been driving the Camaro, were found to be voluntary and admissible. Id. at 411, 319 S.E.2d at 336.

In holding that Miranda warnings were not required, the South Carolina Supreme Court wrote:

A traffic accident had just occurred. Dotson volunteered the information that he and [Morgan] had seen the accident. What followed was a routine investigation into the cause. The statements made by [Morgan] were made during the course of this routine investigation. Miranda warnings were not required.

Morgan at 411-412, 319 S.E.2d 335, 336-337 (internal citations omitted).

The present case can be distinguished from Morgan in numerous ways. Morgan and Dotson returned to the scene of the accident. As such, they likely felt free to leave. Appellant was surrounded by law enforcement officers and undoubtedly the sole focal point of their attention. The uncontradicted testimony by witnesses at Appellant’s trial is that he was not free

to leave. Therefore, Morgan is inapplicable; Appellant was in custody and not free to leave. He was not allowed to use the restroom and was forced to urinate on himself. The interrogation was not “temporary and brief” as was the case in Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

The questioning of Appellant was not incident to an ordinary traffic stop. He was in custody, as admitted by the state’s witnesses. Appellant likely felt completely at the mercy of the police, especially after he was denied the opportunity to use the restroom. There was never a pathway that led to Appellant leaving the parking lot in anything other than handcuffs.

Appellant’s freedom of action was curtailed to a “degree associated with formal arrest.” California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983). Even if a motorist who has been detained pursuant to a traffic stop is thereafter subjected to treatment that renders him “in custody” for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda. Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977).

Law enforcement admitted Appellant was a suspect. He was not free to leave and therefore was in custody. He was deprived of the ability to use the restroom, and he was not allowed to make a telephone call to his sister. The questions asked by Vallin were designed to elicit an incriminating response, and Appellant’s answers to the questions were described by the assistant solicitor as “excellent evidence” and “certainly enough for a jury question as to whether or not he was driving.” R. 85, l. 23 – R. 86, l. 20. Appellant was asked how much he had to drink; this was irrelevant to the accident. See State v. Medley, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016). His statement should have been suppressed.

II. The trial court erred in failing to dismiss Appellant’s charge, where the dashcam video failed to comply with the driving under the influence statute and did not include all of the field sobriety tests administered, or any of the officers reading Appellant his Miranda rights.

Standard of Review

“In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. Thus, 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 (Ct. App. 2011) (citations omitted). “An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law.” Id. (citations omitted).

Discussion

Appellant moved for dismissal of the charges “for failure to meet the requirements as required under the DUI law” because the state failed to include in the dashcam video the field sobriety tests and the administering of Appellant’s Miranda rights. R. 116, l. 22 – R. 117, l. 14. The trial judge found that the state “substantially complied with the requirements under the law.” R. 117, ll. 22 – 24. The court ruled that “the video itself was introduced into evidence and ... that is the requirement.” R. 117, l. 22 – R. 118, l. 3.

Appellant was alleged to have driven under the influence, in violation of S.C. Code Ann. § 56-5-2930. R. 152. “A person who violates Section 56-5-2930... must have his conduct at the incident site and the breath side video recorded.” S.C. Code Ann. § 56-5-2953. The video recording at the incident site must include any field sobriety tests administered and include the arrest of a person for driving under the influence and show the person being advised of his

Miranda rights. Id. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge ... **“if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest ... was in an inoperable condition.”** S.C. Code Ann. § 56-5-2953(i). (emphasis added). No affidavits were offered by law enforcement in this case.

A violation of this section may result in dismissal of the DUI charges. S.C.Code Ann. § 56-5-2953(B); see also City of Rock Hill v. Suchenski, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (holding dismissal of DUI charge is an appropriate remedy if the officer fails to produce a satisfactory video recording unless an exception applies).

It is not possible to determine if Appellant actually heard and understood his Miranda rights. The officers failed to capture the arrest and Miranda warnings on the videotape. The trial court in the matter *sub judice* abused its discretion in finding that the video complied with the statutory requirements. State v. Kinard, 427 S.C. 367, 831 S.E.2d 138 (Ct. App. 2019). Petitioner’s charge should have been dismissed.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests this Court reverse his conviction and dismiss the charge against him, or in the alternative, remand the case for a new trial.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of July, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled “Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.”

July 8, 2020

s/Taylor D. Gilliam
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