THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh Judge

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SC Court of Appeals

C.A. Nos.: 2017-GS-04-0365
Appellate Case no. 2019-001502

State of South Carolina, Respondent,

v.

Dustin Lee Hooper, Appellant.

FINAL REPLY BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

Appellant adopts and incorporates by reference the Statement of Case and Facts presented in his Initial Brief. This appeal is brought pursuant to the dismissal by the trial court of Appellant's motion for directed verdict and motion to vacate judgment. Appellant timely filed his Notice of Appeal and filed his Initial Brief on December 18, 2020. Respondent filed its Initial Brief on June 25, 2020.

ARGUMENTS

I.

RESPONDENT CANNOT RAISE THE ISSUE OF TIMELINESS FOR THE FIRST TIME ON APPEAL

Respondent contends the Motion for Relief of Judgment and Motion to Amend and Motion to Vacate were not timely filed. Respondent raised the issue of timeliness since the Motion for Relief of Judgment was stamped August 8, 2019, instead of August 5, 2019, the tenth day from imposition of sentence on July 25, 2019. It should be noted that Appellant's motion was mailed to the court and Respondent on August 5, 2019. Absent a provision prohibiting filing and serving motions in criminal cases by mail, Appellant believes that filing and service by mail is complete upon mailing.

Rule 29(a) of the SCRCrimP provides that the time for appeal for all parties shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion. The trial court denied Appellant's on August 29, 2019. He served and filed his Notice of Appeal on August 30, 2019, well within the time limit.

More importantly, Respondent did not raise the issue of timeliness in its Response to Appellant's motions nor in the hearing of the motions on August 29, 2019. Objections not raised in the trial court cannot be relied on in the appellate court. Wilson v. Clary, 212 S.C. 250, 47

S.E.2d 618 (1948) as cited in Doe v. SBM, 327 S.C. 352 (1997).

> As a general rule, an issue may not be raised for the first time on appeal but must have been raised to the trial judge to be preserved for appellate review. Issues not raised in the trial court will not be considered on appeal.

Anonymous v. State Board of Medical Examiners, 323 S.C. 360, 473 S.E.2d 870, 879 (Ct. App. 1996).

II.

THE TRIAL COURT'S DECISION SHOULD BE REVERSED FOR VIOLATION OF THE VIDEOTAPING LAW.

Respondent contends that the traffic stop, arrest and subsequent conviction of Appellant was justified because Respondent produced a video of Appellant showing his field sobriety test. Appellant maintains that the video does not make the stop and the arrest a valid one for the following reasons: (1) it was incomplete; (2) it was not recorded and produced by the arresting officer; and, (3) Respondent did not submit the required Affidavit. As such, Respondent is considered as not to have complied with the videotaping requirements, or S.C. Code Ann.§ 56-5-2953, at all.

The DUI Videotaping Statute

SC Code Ann. §56-5-2953(A) mandates police vehicles to be equipped with recording equipment. It provides:

> 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;
>
> (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.

The video submitted was incomplete and tainted, and does not comply with the provisions of S.C. Code Ann.§ 56-5-2953.

First, as previously alleged by Appellant, the video that Respondents provided to herein Appellant did not show when the blue lights were activated in relation to the stop. It only showed the car with the blue lights already on. The video was also missing an audio recording. This prevented the jury from hearing the entire audio recording.

This video requirement provides a semblance of due process for Defendant. It is well-established that a police officer may stop a vehicle when the officer has probable cause to believe a traffic violation has occurred, or when the officer has reasonable suspicion the occupants are involved in criminal activity. State v. Burgess, 394 S.C. 407, 412, 714 S.E.2d 917, 919 (C. App. 2011)). In this case, the traffic stop was effectuated based on an anonymous tip. And while anonymous tip can provide the basis of a stop, the officer conducting the stop has to verify the tip's reliability by observing the suspect engaged in criminal activity. Alabama v. White, 496 U.S. at 331, 110 S. Ct. 2412.

It is admitted that Officer Coon responded to a BOLO call for a red Honda Civic with tag JKB-851 that was allegedly being driven recklessly. Based on Officer Coon's testimony, his interest has been piqued by Appellant's vehicle when he first observed the same "underneath the bypass at a stoplight." (R., p. 46, 8-14). He admitted that he turned around and seeing that the color of Appellant's vehicle did not fit the anonymous tip's description, Officer Coon had to call the dispatch for confirmation. (R., 46, 15-25 & p. 47, 1). It was upon that point that Officer Coon initiated his blue lights. (R., p. 47, 2-10). Prior to turning the blue lights, Officer Coon did

not mention seeing Appellant speeding or driving erratically. It was after Coon turned his blue lights that he allegedly observed Hooper making hard right turn, without signal. Officer Coon did not personally observe Appellant's vehicle in violation of any traffic laws.

Neither did Trooper Griffin have reasonable suspicion as he had not personally observed Appellant's driving. Respondent contends that Trooper Griffin saw the violation occur because he had seen Appellant driving from the opposite side of the road. (Initial Brief of the Respondent, p. 15). In the same breadth however, Respondent cited Trooper Griffin's testimony that at the time he saw Appellant, the later was already being pulled over. *Ibid.* Clearly, he has not observed Appellant's driving to form a reasonable suspicion that it was beyond the speed limit nor that it was reckless.

This blind reliance on an anonymous tip could have been prevented had the video been initiated as soon as Officer Coon ascertained any violation committed by Appellant. Unfortunately, he had not observed any offending action. He initiated the blue lights solely based on the BOLO call.

Without the video, the reason for the stop could not be determined. Defendant maintains that the video needed to include the entire procedure, including the stop conducted upon Appellant. As presented, the video did not show how and why Officer Coon stopped Appellant. The video started with Appellant's and the patrol cars already parked, and the officer approaching Defendant. The legislature did not intend only those events enumerated in the statute to be recorded. State v. Taylor, 768 S.E.2d 71 (S.C. Ct. App. 2014). The plain language of the statute demonstrates the legislature intended video recording of the majority of an officer's encounter with a potential DUI suspect. *Ibid.*

Additionally, the video submitted had missing audio recording. This prevented the jury from hearing the entire audio recording. The recording would have given the jury the opportunity to see the defendant conduct himself while addressing the requests of law enforcement. On the same token, it allows a jury to see what the State considers appreciably impaired. With the video incomplete, it is inadmissible for being tainted. Without this video that would illustrate these facts, Appellant was prejudiced to the point that the whole process was unreliable.

Since neither Officer Coon nor Trooper Griffin proved had a reasonable and articulable suspicion that Appellant had been driving recklessly, the traffic stop is not legitimate. Any and all evidence derived from such stop should have been suppressed.

The arresting officer failed to produce the videotape in violation of the DUI videotaping statute.

According to Officer Coon, he did not videotape the stop since he did not have the equipment to do so. This is no longer a valid excuse since the Appellate Court in the case of *Town of Mt. Pleasant,* found that the protracted failure to equip its patrol vehicles with video camera defeated the intent of the Legislature. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011). It has been twenty-two (22) years since section 56–5–2953 and the overall DUI reform enacted in 1998. The ACSO has yet to fully implement this requirement.

Trooper Griffin submitted a deficient videotape of the DUI arrest. The very reason the statute declares the arresting officer must have the video from the initiation of the blue lights is to lessen the State's subjective analysis with video proof of the existence of the drunk driving–or not. There was none here.

No sworn affidavit was provided by the arresting officer as required

in § 56-5-2953 (B).

Because the statute was violated when the proper video is not submitted, the arresting officer must submit a sworn affidavit in compliance with § 56-5-2953 (B).

> However, non-compliance with the recording requirement is excusable and is not alone a ground for the dismissal (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable and stating which reasonable efforts were made to maintain it; (2) if the arresting officer submits a sworn affidavit that it was physically impossible to produce the videotape because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) when an arrest is made and the camera has not been activated if video recording begins and conforms with the requirements as soon as practicable in circumstances including, but not limited to, roadblocks, traffic accident investigations, and citizen's arrests; or (4) for any other valid reason for the failure to produce the videotape upon the totality of the circumstances. § 2953(B).

State v. Taylor, supra.

The State relied on State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004) to explain away the statutory requirement that a person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct begin, not later than the activation of the officer's blue lights. In Landis, the video camera of the arresting officer was inoperable. However, he had witnessed the erratic driving of Mr. Landis and, therefore, had probable cause to pull him over. The arresting officer provided an affidavit which stated that his lack of video was due to his camera being inoperable. The certification of the inoperable video equipment satisfied the statutory requirement.

> MR. STOLARSKI: Oh, okay. This is a factual scenario, and it's almost identical to Landis. I would say that the only arresting officer is required to produce a videotape in compliance with the statute. Landis dealt with a situation where a state transport officer who didn't have video pulled over the defendant.

> 09. Right behind him came officer -- Trooper Davis
> 10. with the highway patrol. Officer pulled up behind
> 11. that officer. He ended putting him through field
> 12. sobriety tests and ended up arresting him for DUI.
> 13. Now, as it turns out, Officer Davis didn't have
> 14. a video either, but he had an affidavit stating why
> 15. he didn't have a video.

(R., p. 64, 2-15).

In the case at hand, Trooper Griffin did not provide an affidavit certifying why he failed to provide video "from the activation of the officer's blue lights". The plain language of the statute provides for those times when video is not available to satisfy section 56-5-2953(A). However, 56-5-2953(B) must be satisfied with certification for its absence by way of affidavit. Trooper Griffin failed to certify the lack of complete video and, therefore, failed to satisfy the mandatory provisions of section 56-5-2953.

> Failure by the arresting officer to produce the videotapes is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-2933, or 56-5-2945 if [exceptions apply] (emphasis added). Conversely, failure to produce videotapes would be a ground for dismissal if no exceptions apply.

City of Rock Hill v. Suchenski, 374 S.C. 12 (S.C. 2007).

Respondent has not complied with the requirements of section 2953(A) or the exceptions of section 2953(B) of the statute. Therefore, the dismissal of the charge is an appropriate remedy. *Ibid.*

CONCLUSION

Based on the foregoing, in addition to the arguments made in the opening brief, Appellant respectfully requests this Honorable Court to grant Appellant's appeal, and to reverse and vacate the judgment of the trial court.

{SIGNATURE TO FOLLOW}

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FORM 16
CERTIFICATE OF COUNSEL

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CERTIFICATE OF COUNSEL

The undersigned counsel hereby certify that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR

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