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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY

Daniel D. Hall, Circuit Court Judge

Case No. 2020-CP-46-00996

The State……..…..……..Respondent,

v.

Daniel M. Belk……..…….……...…….….Appellant.

INITIAL BRIEF OF APPELLANT

Heath P. Taylor
Taylor Law Firm LLC
3227-E Sunset Boulevard, Suite 101
West Columbia, South Carolina 29169
(803) 926-2205

and

Michael L. Brown
Law Offices of Michael L. Brown
403 East White Street
Rock Hill, South Carolina 29730
(803) 328-8822

Attorneys for Appellant

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STATEMENT OF THE CASE

Appellant was arrested for Driving Under the Influence, First Offense, in York County by State Trooper J. P. Jakell on August 2, 2019. On March 4, 2020, the case was called for a bench trial before the Honorable Clayburn Barnette, Jr. in the York County Magistrate's Court. Prior to trial, counsel for Appellant moved to dismiss the case pursuant to S.C. Code Ann. § 56-5-2953 (Supp. 2019) based upon the arresting officer's failure to properly advise Appellant of his *Miranda* rights. The motion was denied. Following the presentation of the State's case, the magistrate found Appellant guilty. (Magistrate's Return, pp.1 - 2).

Appellant filed an appeal in the York County Court of Common Pleas on or about March 11, 2020 (Appellant's Notice of Appeal to the Circuit Court). The parties appeared before the Honorable Daniel D. Hall on June 22, 2020 in order to address the merits of Appellant's appeal. By Order filed June 25, 2020, Judge Hall affirmed the magistrate's decision (Order of the Honorable Daniel D. Hall filed June 25, 2020). On or about July 2, 2020, Appellant filed a Motion to Reconsider (Appellant's Motion to Reconsider filed July, 2, 2020). By Order filed July 15, 2020, Appellant's Motion to Reconsider was denied (Order of the Honorable Daniel D. Hall filed July 15, 2020). This appeal followed.

FACTS

On August 2, 2019, State Trooper J. P. Jakell responded to a collision on S.C 155 in

York County, South Carolina. Upon his arrival, Trooper Jakell found Appellant in his vehicle. Trooper Jakell detected the odor of alcohol on Appellant and requested that he perform certain standardized field sobriety tests. After failing to perform the field sobriety tests to the satisfaction of Trooper Jakell, Appellant was placed under arrest for Driving Under the Influence, 1st Offense. Upon arresting Appellant, Trooper Jakell attempted to advise Appellant of his *Miranda*[1] rights by stating the following:

> You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney one will be appointed. Do you understand your rights?

Appellant was subsequently properly advised of his implied consent rights. He submitted to a breath test and registered a blood alcohol concentration of 0.13%. (Magistrate's Return, pp.1 - 2).

At the trial of the case, counsel for Appellant moved to dismiss the case pursuant to S.C. Code Ann. § 56-5-2953 (Supp. 2019) based upon the arresting officer's failure to properly advise Appellant of his *Miranda* rights. Specifically, counsel argued that Trooper Jakell's recitation of *Miranda* was incomplete because he omitted a portion of the rights requiring Appellant to be informed that an attorney would be appointed for him *prior to any questioning*. During a hearing on the motion, the State stipulated that Trooper Jakell's *Miranda* advisement was incomplete (Transcript, p. 6, lines 2 – 4; p. 8, lines 5 – 9; p. 8, lines 16 – 18). The magistrate agreed that the *Miranda* advisement was incomplete and suppressed all statements by Appellant following the advisement but declined to dismiss the case pursuant to S.C. Code Ann. § 56-5-2953 (Supp. 2019) (Transcript, p. 6, lines 7 – 13; p. 8, lines 11 - 16). Following a bench trial, Appellant was found guilty of Driving Under the

1 *Miranda v. Arizona*, 384 U.S. 486, 86 S.Ct. 1602 (1966).

Influence, First Offense.

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." *State v. Gordon*, 414 S.C. 94, 99, 777 S.E.2d 376, 378 (2015).

ARGUMENT

I. THE LOWER COURT ERRED IN AFFIRMING THE MAGISTRATE'S DENIAL OF APPELLANT'S MOTION TO DISMISS PURSUANT TO S.C. CODE ANN. § 56-5-2953 (SUPP. 2019) WHEN THE ARRESTING OFFICER FAILED TO PROPERLY ADVISE APPELLANT OF HIS *MIRANDA* RIGHTS.

S.C. Code Ann. § 56-5-2953 (A) (Supp. 2019) requires that a person who has violated S.C. Code Ann. § 56-5-2930 (Supp. 2019) have his or her conduct at the incident site video recorded. Specifically, S.C. Code Ann. § 56-5-2953 (A)(1)(a)(iii) (Supp. 2019) requires that the video recording must ". . . show the person being advised of his Miranda rights." As frequently recited by our appellate courts in reviewing S.C. Code Ann. § 56-5-2953 (Supp. 2019), statutes must be interpreted with realistic circumstance and rationales in mind. *State v. Elwell*, 403 S.C.606, 743 S.E.2d 802 (2013). Additionally, penal statutes will be strictly construed against the state and in favor of the defendant. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011).

Our Supreme Court has strictly interpreted the requirements of S.C. Code Ann. § 56-5-2953 (Supp. 2019) and has noted that it ". . . provides for dismissal of charges when the statute is inexcusably violated." *City of Rock Hill v. Suchenski*, 374 S.C. 12, 16, 646 S.E.2d 879, 881 (2007). Further, our Supreme Court has held:

> As evidenced by this Court's decision in *Suchenski*, the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56–5–2953. Notably, the Legislature specifically provided for the dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. *Id.* § 56–5–2953(B) ("Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56–5–2930. . . if [certain exceptions are met]."). The term "dismissal" is significant as it explicitly designates a sanction for an agency's failure to adhere to the requirements of section 56–5–2953. . . . By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn promulgated a severe sanction for noncompliance.

Roberts, 393 S.C. at 348 – 349, 713 S.E.2d at 286.

The facts in the present case are not in dispute. Trooper Jakell's required advisement of *Miranda* rights to Appellant was incomplete. The record establishes that Trooper Jakell advised Appellant of the following rights:

> You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney one will be appointed. Do you understand your rights?

(Magistrate's Return, p. 2). In *State v. Cannon*, 260 S.C 537, 542-543, 197 S.E.2d 678, 680 (1973), our Supreme Court held the following warnings complied with the mandates of *Miranda:*

> You have the right to remain silent; anything you say can and will be used against you in a court of law; you have the right to talk to a lawyer **and have him present with you while you are being questioned**; If you cannot afford to hire a lawyer, one will be appointed **to represent you before any questioning if you wish one**.

(emphasis added). *See also*, *State v. Hoyle*, 397 S.C. 622, 725 S.E.2d 720 (2012). As illustrated, Trooper Jakell's warning omitted critical portions of a proper *Miranda* warning with regard to the timing of Appellant's right to counsel. Moreover, the State stipulated and the magistrate ruled that the *Miranda* warnings given to Appellant were incomplete

(Transcript, p. 6, lines 2 – 4 and lines 7 – 13; p. 8, lines 5 – 9; p. 8, lines 11 – 18). On appeal to the circuit court, Appellant argued that the remedy was dismissal as opposed to suppression. The State did not appeal the magistrate's ruling that the *Miranda* advisement was incomplete. Therefore, the magistrate's ruling that the *Miranda* warnings were incomplete is the law of the case. *See*, *Smith v. State*, 413 S.C. 194, 775 S.E.2d 696 (2015) (holding an unappealed ruling, right or wrong, is the law of the case).

The purpose of the video requirement in the statute "is to create direct evidence of a DUI arrest." *Roberts,* 393 S.C. at 347, 713 S.E.2d at 285. In *State v. Taylor,* 411 S.C. 294, 306, 768 S.E.2d 71, 77 (Ct. App. 2014), our Court of Appeals stated:

> 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. Nonetheless, interpreting the statute to require dismissal of the charges when the defendant is off camera for a short period of time and the gap does not occur during any of those events that either create direct evidence of a DUI or **serve important rights of the defendant** would result in an absurdity that could not possibly have been intended by the legislature.

(emphasis added). In *Taylor*, this court did not dismiss the case when the defendant was briefly off camera but the Court has interpreted S.C. Code Ann. § 56-5-2953 (Supp. 2019) in a manner that requires evidence relating to the rights of the defendant be properly captured on video with dismissal as the appropriate remedy. More recently, in *State v. Kinard,* 427 S.C. 367, 373, 831 S.E.2d 138, 141 (Ct. App 2019), this Court stated:

> Given our understanding of the legislative intent in section 56-5-2953(A), the requirement that the arrest and *Miranda* reading be videotaped serves to protect the rights of the defendant.

While the *Kinard* court did not dismiss the case due to the Defendant's conduct, the court acknowledged that our legislature places significant importance on the *Miranda* requirements found in section 56-5-2953.

Like this court, our Supreme Court has recognized the importance the legislature has placed on the *Miranda* requirement. In *State v. Sawyer,* 409 S.C. 475, 480, 763 S.E.2d 183, 185-186 (2013) the court stated:

> However, the statute required a videotape not merely of the individual's conduct while being read his *Miranda* and informed consent rights, but also that it "must include" "the reading of *Miranda* rights" and "the person being informed that he is being videotaped, and that he has the right to refuse the test." § 56-5-2953(A)(2)(b).

In *Sawyer,* the audio recording was not working properly and thus, the *Miranda* advisement could not be heard on tape. The *Sawyer* court rejected the State's claim that the failure to properly record the *Miranda* advisement was merely a defect in evidence. The court noted:

> While defects in evidence do not generally affect admissibility, as the State maintains, the Court has interpreted the statute to require strict compliance with Section (A) as a prerequisite for admissibility, unless an exception in Section (B) applies. . . . The General Assembly is presumed to be aware of this Court's interpretation of a statute, and where that statute has been amended, but no change has been made that affects the Court's interpretation, the legislature's inaction is evidence that our interpretation is correct.

Sawyer, 409 S.C. at 481, 763 S.E.2d at 186 (citation omitted). The *Sawyer* court affirmed this Court's decision which affirmed the trial court's suppression of the videotape. However, in footnote 6, the *Sawyer* court further noted:

> The only arguable error of law was the circuit court's failure to dismiss the charges once it determined that the State did not produce a videotape meeting the requirements of (A) and that it did not meet any of the exceptions in (B).

Sawyer, 409 S.C. at 486, 763 S.E.2d at 189. The same holds true in the present case.

As acknowledged by the magistrate below as well as the State, Trooper Jakell failed to properly advise Appellant of his *Miranda* rights. Although he partially advised Appellant of his rights, S.C. Code Ann. § 56-5-2953 (Supp. 2019) does not contain an exception for attempted compliance with the video recording requirements. The videorecording in this

case simply does not show Appellant being advised of his *Miranda* rights as required by S.C. Code Ann. § 56-5-2953 (Supp. 2019). Therefore, the State failed to produce a videorecording required by section 56-5-2953 (A).

As noted above, our Supreme Court has consistently held that dismissal is an appropriate remedy for non-compliance with S.C. Code Ann. § 56-5-2953 (Supp. 2019). Appellant acknowledges that South Carolina appellate courts have, in limited instances, declined to dismiss for questionable or technical violations of S.C. Code Ann. § 56-5-2953 (Supp. 2019). However, the present case does not fit into any of those categories.

In *State v. Gordon*, 414 S.C. 94, 777 S.E.2d 376 (2015), Gordon argued that the video violated S.C. Code Ann. § 56-5-2953 (A) because he was out of sight and in the dark during the HGN test. Our Supreme Court found that even though the video was of poor quality, the administration of the HGN test was visible and the officer complied with S.C. Code Ann. § 56-5-2953. The court held that dismissal was not an appropriate remedy because the officer complied with the statute and the appropriate remedy would be to redact the HGN test from the video. In essence, the court held that poor quality of a video is not grounds for dismissal as long as the officer has complied with section 56-5-2953. Redaction or suppression is not appropriate in the present case because unlike the arresting officer in *Gordon,* Trooper Jakell failed to comply with section 56-5-2953 (A)(1)(a)(iii) when he failed to advise Appellant of his *Miranda* rights.

In *State v. Taylor*, 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014), this Court reversed the dismissal of Taylor's DUI charge finding that a brief omission of Taylor from the video did not warrant the sanction of dismissal. As noted above, the *Taylor* court suggested that dismissal would be appropriate if the failure to properly record the defendant occurred during

events that ". . . serve important rights of the defendant." *Taylor*, 411 S.C. at 306, 768 S.E.2d at 77. The Court further noted;

> *Suchenski*, *Murphy*, and *Gordon* demonstrate the plain language of the statute does not require the video to encompass every action of the defendant, **but requires video of each event listed in the statute.**

Taylor, 411 S.C. at 305, 768 S.E.2d at 77 (emphasis added). The advisement of *Miranda* rights is an event listed section 56-5-2953 (A)(1)(a)(iii) and must be properly video recorded. Therefore, the conduct of Trooper Jakell violated section 56-5-2953 and the videorecording in this case is not akin to the videorecording in *Taylor*.

More recently, in *State v. Kinard*, 427 S.C. 367, 831 S.E.2d 138 (Ct. App. 2019), this Court held that held that section 56-5-2953 (A) requires that the videorecording show the defendant being advise of his *Miranda* rights. In *Kinard*, the defendant could not be seen on video while being advised of his rights. As noted above, the *Kinard* court placed significant emphasis on the Legislature's intent that the *Miranda* advisement be properly videorecorded. However, the court reversed the dismissal of Kinard's case based upon the totality of the circumstances exception in section 56-5-2953 (B). Kinard had become unruly and was placed in a deputy's car. Therefore, the failure to properly video Kinard's *Miranda* advisement was due to Kinard's conduct. Section 56-5-2953 (B) does not apply in the present case. Trooper Jakell simply failed to offer Appellant a valid advisement of his *Miranda* rights and his case should have been dismissed.

The magistrate and the State agreed that Trooper Jakell failed to properly advise Appellant of his *Miranda* rights. Consequently, the State failed to produce a videorecording from the incident site in compliance with section 56-5-2953 (A) and Appellant's case should have been dismissed. This Court should adhere to well-established precedent interpreting

S.C. Code Ann. § 56-5-2953 and reverse the rulings of the lower courts.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that this Court reverse the decision of the circuit court and order that the charge against Appellant be dismissed pursuant to S.C. Code Ann. § 56-5-2953 (Supp. 2019).

Respectfully submitted,

January 4, 2021

/s/ **Heath P. Taylor**
Heath P. Taylor
S.C. Bar No. 15517
Taylor Law Firm LLC
3227-E Sunset Boulevard, Suite 101
West Columbia, South Carolina 29169
Telephone: (803) 926-2205
Telecopier: (803) 926-4966
Email: heath@taylorlawsc.com

and

Michael L. Brown
Law Offices of Michael L. Brown
403 East White Street
Rock Hill, South Carolina 29730
Telephone: (803) 328-8822

Attorneys for Appellant