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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS
Appeal from Spartanburg County
Circuit Court

J. Mark Hayes, II
Circuit Court Judge

Supreme Court Case No.: 2020-001184

State of South Carolina .....Petitioner,

v.

Kenneth Taylor ..... Respondent.

BRIEF OF *AMICUS CURIAE* SOUTH CAROLINA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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ISSUE ON APPEAL

I. Whether the three tribunals below erred in finding that a video that only contained audio of the arresting officer informing Respondent of his *Miranda* rights violated S.C. Code § 56-5-2953(A)(1)(a)(iii), which requires said video to "show the person being advised of his Miranda rights."

STATEMENT OF THE CASE

The factual background and trial history is ably set forth by Magistrate Judge Paslay in his Return:

> The above styled case came for jury trial in the Spartanburg Magistrate Court on May 25, 2016, Judge James B. Paslay presiding. The state was represented by Assistant Seventh Circuit Solicitor Spenser H. Smith and the defendant was represented by Attorney Zachary D. Ellis. Prior to swearing a jury, the defense made a motion to dismiss the case alleging a violation of Section 56-5-2953, the DUI videotaping statute.
>
> * * *
>
> In the instant case, the defendant was arrested for violation of Section 56-5-2930 (DUI). However, **it is without dispute that the officer videotaped everything required by the statute with the exception of the advisement of Miranda rights. The advisement is there but the defendant is not shown on the videotape.** The tape only provides the audio advisement even though the officer could have easily turned the camera toward the defendant as he sat in the officer's patrol vehicle. Therefore, the facts show that the officer made a conscious decision not the depict the defendant during this advisement.
>
> It was the court's understanding that these facts were not in dispute. **Additionally, the statute in question provides exceptions in Part (B) of the statute, excusing videotaping under certain circumstances, but no exceptions were argued by the state nor are they supported by the facts as set forth above.** The court concluded that no exigent circumstances existed, there was no officer safety issue, and no equipment malfunction. There was no life and death traffic accident issues…
>
> * * *
>
> …this court ruled that the officer had violated the mandatory videotaping requirements of the statute, that the violation was not excused by a Part(B) exception, and the appropriate remedy pursuant to [*City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007)] was a per se dismissal of the case.

(R 10-11) (emphasis added).

The State appealed to the Circuit Court, which heard this appeal on September 12, 2016, and affirmed the dismissal by order dated October 20, 2016. (R 1-6). On October 28, 2016, the

State served its notice of appeal to the South Carolina Court of Appeals.[1] Respondent was unrepresented before the Court of Appeals, which on July 15, 2020, affirmed the Circuit Court in a *per curiam* opinion (2020-UP-215). On February 18, 2021, the State petitioned this Court for a writ of certiorari. This Court granted the State's petition on January 25, 2021.

[1] Respondent's attorney lost contact with him after the September hearing, and he did not represent Respondent on further appeals.

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).

State v. Kinard, 427 S.C. 367, 371, 831 S.E.2d 138, 140 (Ct. App. 2019), *cert. dismissed as improvidently granted*, 429 S.C. 614, 840 S.E.2d 924 (2020).

> The appeal [from a summary court in a criminal case] must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court. And the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial, as to the court may seem meet and conformable to law.

S.C. Code § 18-3-70.

ARGUMENT

This appeal presents this Court with a straightforward issue of statutory interpretation resolvable with a common desktop dictionary. The State, as it did recently in *State v. Kinard*,[2] again invites this Court to rewrite the definition of the word "show" to something plainly outside of the intent of the legislature or the context of the statute. This Court must decline the State's invitation and affirm the Court of Appeals.

I. The statute at issue clearly states an arrest video must "show" advisement of *Miranda* rights, and the case law interpreting this provision requires the advisement be seen.

The statute at issue reads 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.**
>
> * * *

S.C. Code § 56-5-2953(A)(1) (emphasis added).

"The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal quotation marks omitted). "What a legislature says in the text of a statute is considered the best evidence of

[2] This Court heard oral arguments in *Kinard* on March 11, 2020, and dismissed the writ of certiorari on March 18, 2020. *State v. Kinard*, 429 S.C. 614, 840 S.E.2d 924 (2020).

the legislative intent or will." *Id*. "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id*. (internal quotation marks omitted). "However, penal statutes will be strictly construed against the [S]tate." *Elwell*, 403 S.C. at 612, 743 S.E.2d at 806 (citation omitted).

"If the statute is ambiguous, however, courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *State v. Sweat*, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Roberts*, 393 S.C. at 342, 713 S.E.2d at 283. "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Id*. (internal quotation marks omitted). "Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." *Id*. at 342-43, 713 S.E.2d at 283.

The South Carolina Court of Appeals recently interpreted S.C. Code § 56-5-2953(A)(1)(a)(iii) in *State v. Kinard*, 427 S.C. 367, 373, 831 S.E.2d 138, 141 (Ct. App. 2019), *cert. dismissed as improvidently granted*, 429 S.C. 614, 840 S.E.2d 924 (2020). *Kinard* concerned a video where the arresting officer could be heard advising the defendant of his Miranda rights, but the recording did not contain video or audio of the defendant acknowledging them. *Id.* at 370, 646 S.E.2d at 369. The Court of Appeals considered both the language of the statute and the statute's intent and found the defendant must be visible in the video:

> Section 56-5-2953(A)(1)(a) states the "video recording at the incident site must:…show the person being advised of his Miranda rights." The trial court interpreted the word "show" to mean "to cause or to permit the person being advised of his Miranda rights to be seen." This interpretation comports with the plain language of the statute and with the legislative purpose of protecting the rights of the defendant. In addition, section 56-5-2953(A) states a person who violates the DUI provision "must have his conduct at the incident cite…video recorded." Under a plain reading of the statute, a person's conduct cannot be captured from a video in which he cannot be seen.

Id. at 372, 831 S.E.2d at 141.

Similarly, in *State v. Sawyer*, 409 S.C. 475, 763 S.E.2d 183 (2014), this Court addressed whether a silent video meets the requirements of section 56-5-2953(A). This Court found "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.'" *Id.* at 480, 763 S.E.2d at 185-86 (quoting S.C. Code Ann. § 56-5-2953(A)(2)(b)). Thus, this Court held a silent video did not meet the requirements of section 56-5-2953(A). *Id.*

Like *Kinard* and *Sawyer*, this Court is presented a situation where the arrest video does not "show" the subject receiving his advisement of *Miranda* rights. Accordingly, the requirement of S.C. Code § 56-5-2953(A)(1)(a)(iii) has not been met; the officer has not presented any excuse for this failure under section 56-5-2953(B), and the three tribunals below were correct in dismissing the charge against Respondent. *See City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007). (A DUI charge must be dismissed when the statute is inexcusably violated.).

II. The State's proposed redefinition of "show" does not comport with the plain meaning of the word or legislative intent.

The State believes this Court should adopt a definition of "show" in S.C. Code § 56-5-2953(A)(1)(a)(iii) that means: "to make apparent" or "to demonstrate, reveal, or make evident". (Pet. Brief p. 7). This is the same argument advanced by the State in *Kinard*, both at the Court of Appeals and before this Court.[3] While "show" can have the State's proposed meanings in some contexts, it is patently absurd to adopt the State's definition in the context of a statute that requires video recording. *See* S.C. Code § 56-5-2953(A) ("A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site…video recorded.").

The State's proposed interpretation of "show" also runs contrary to legislative intent. The intent of S.C. 56-5-2953(A) is explained in *Kinard*:

> Our courts examined the legislative intent of section 56-5-2953 and determined "the primary intention behind 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." *State v. Elwell*, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011), *aff'd*, 403 S.C. 606, 743 S.E.2d 802 (2013). In *State v. Taylor*, 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014), we determined 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. Id. at 306, 768 S.E.2d at 77. 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.*

Kinard, 427 S.C. at 372, 831 S.E.2d at 140-141. The State's proposed definition of "show" allows law enforcement to present *less* evidence of intoxication, making "swearing contests" *more*

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[3] The *Kinard* appellate record before the Court of Appeals can be found at: https://ctrack.sccourts.org/public/caseView.do?csIID=62785

The *Kinard* appellate record before this Court can be found at: https://ctrack.sccourts.org/public/caseView.do?csIID=70852

The March 11, 2020 oral arguments before this Court can be found at: http://media.sccourts.org/videos/2019-001604.mp4

frequent. It also invites mischief by law enforcement, such as mirandizing a subject who is incapacitated, but who can still speak; impersonating a subject off-camera; or intimidating a subject off-camera. Contrary to the arguments of the State,[4] there is much to gain from viewing a subject's *Miranda* advisement.

Finally, the State's argument ignores the existence of S.C. Code § 56-5-2953(B), which provides a process by which noncompliance with subsection (A) can be excused. This is the major difference between this appeal and *Kinard*, where the Court of Appeals found the officer's noncompliance with subsection (A) was excused under subsection (B). Here, the State has presented no evidence of excusing the officer's noncompliance with subsection (A), and even if such evidence existed, this argument was not preserved.

CONCLUSION

The Court of Appeals should be affirmed.

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[4] "Nothing is gained by watching [Respondent] sit and listen to the Miranda rights being read and watching him respond acknowledging his understanding of those rights." (Petitioner's Brief p. 7).