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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL E. SANDERS,

APPELLANT

Appellate Case 2021-CP-01-00135

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS1

TABLE OF AUTHORITIES2

STATEMENT OF ISSUES ON APPEAL.....3

STATEMENT OF THE CASE4

ARGUMENT5

CONCLUSION.....16

TABLE OF AUTHORITIES

Cases

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963)..... 5, 6,7,10

City of Rock Hill v. Suchenski, 374 S.C. 12 (2007) 9

S.C. DMV v. McCarson, 391 S.C. 136 (2011) 5

State v. Frazier, 394 S.C. 213 (2011) 5

State v. Kindard, 427 S.C. 367 (2019) 6

State v. Walters, 418 S.C. 303 (2016) 6,7

Town of Mt. Pleasant v. Roberts, 393 S.C. 332 (2011)..... 9,10

South Carolina Statutes

S.C. Code of Laws 56-5-2953(A) 4,5,6,7,8,9,10

S.C. Code of Laws 56-5-2953(B) 4,7,8,9,10

STATEMENT OF ISSUES ON APPEAL

1. Did the court err in ruling that there was not a Rule 5/Brady Motion
Violation by the State?
2. Did the court err in ruling that the State had not violated S.C. Code Section
56-5-2953(A)?
3. Did the court err in ruling that the State had not violated S.C. Code Section
56-5-2953(B)?
4. Did the court err in denying the appellant's motion for dismissal based off of
nos. 1-3?
5. Did the court err in denying the appellant's motion for a directed verdict
based off of nos. 1-3?

STATEMENT OF THE CASE

Michael E. Sanders, through counsel, submits this brief in support of his motion to have his previous judgment overruled. On May 7, 2021, the appellant, Mr. Sanders, was tried by a jury in Abbeville County. The trial was presided over by Abbeville County Magistrate Judge, Susan G. Gladden. The State was represented by Trooper Cwynar, SCHP, and Myreon S. Williams of the 8th Circuit Public Defender's Office represented the appellant. Before the commencement of the trial, the appellant's attorney moved to have the trial dismissed due to violations by the State of Rule 5 and S.C. Code of Laws Sections 56-5-2953(a) and (b). Both of these motions were denied by the Magistrate. Before the case was sent to the jury, the appellant's attorney made a motion for a directed verdict due to the State's failure to prove their burden. This motion was also denied by the Magistrate. The errs in judgment by the Magistrate are the reason for the Appellant's initial appeal. On May 19, 2021, the appellant filed a motion for an appeal which was scheduled to take place on July 20, 2021. On July 20, 2021 oral arguments were heard before Circuit Court Judge, Donald B. Hocker in Abbeville County. The State was represented by Micah Black of the 8th Circuit Solicitor's Office and the appellant was represented by Myreon Williams of the 8th Circuit Public Defender's Office. On September 3, 2021 Judge Hocker ruled that the Magistrate court had not erred in its earlier rulings.

This appeal follows.

ARGUMENT

1. The Magistrate erred by finding that the State had not violated the Appellant's Rule 5 *Brady* motion for discovery.

The Magistrate argues that the Appellant's motion failed in four categories: (a) it failed to demonstrate the evidence was favorable to the Defendant, (b) was in the State's possession, (c) was suppressed by the State, or (d) was material to guilt or punishment citing *State v. Frazier*. Appellant argues that all of these points are in error and are demonstrated not only by the Appellant's motion and testimony from the State, but by standing South Carolina case law.

The State had the burden the burden first of showing probable cause pursuant to S.C. Code Section 56-5-2953(A)(1)(a)(iii). Further, South Carolina Case law indicates that the State has the burden of proving probable cause for an arrest. *S.C. DMV v. McCarson*, 391 S.C. 136 (2011). In *Brady v. Maryland*, the U.S. Supreme court ruled that withholding of evidence that is material to guilt or punishment by the State is a violation of the due process rights of a defendant irrespective of good or bad faith on behalf of the prosecution. 373 U.S. 83 (1963).

In the present case, the Appellant argued during the magistrate jury trial, that the State never demonstrated that there was probable cause to first stop the Appellant. The State failed to provide the Appellant with video of the appellant's alleged impaired driving, giving probable cause for his arrest. The State's representative, Trooper Cwynar testified that he was not the officer that noticed the Appellant alleged impaired driving (CD Time 16:45). Trooper Cwynar further stated that he had no evidence of bad driving on cross examination (CD Time 39:48) Without evidence of this impaired driving that

gave rise to the series of events, the State purposefully handicapped the Appellant's ability to prepare a complete defense pursuant to *Brady*. Further Trooper Cwynar's admission on the stand that he was aware that he was being dispatched due to drunk driving. (39:48). As stated during the Appellant initial opening motions, the notion of impaired driving is at the heart of this case. The video surveillance of the initial blue lights that gave rise to the Appellant's traffic stop are a necessary part of the Appellant's multiple request for Rule 5 discovery. Without explicit mention by the Appellant, this video is crucial to guilt or innocence determination during the Appellant's jury trial.

For these reasons, the Appellant emphasizes that the ruling of the Magistrate on the *Brady* violation was in error.

2. The Magistrate erred by finding that the State had not violated S.C. Code Section 56-5-2953(A).

South Carolina Code Section 56-5-2953(A) states:

(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 56-5-2945, and show the person being advised of his Miranda rights.

South Carolina has also addressed the concept of video recordings in many of its case law as well. The Supreme Court of South Carolina in *State v. Kinard*, indicated that any videos of the incident site report must include any field sobriety tests administered. 427 S.C. 367 (2019). The concept was expanded upon by the South Carolina Court of Appeals in *State v. Walters*. The Court in *Walters* discussed the video recording of one of

the types of field sobriety tests, Horizontal Gaze Nystagmus (HGN), stating, "because the HGN test focuses on eye movement, common sense dictates that the head must be visible on the video." 418 S.C. 303 (2016).

As mentioned in the previous section, the Appellant argued that the State did not comply successfully with S.C. Code Section 56-5-2953(A)(1)(i-iii) because it failed to include the activation of the blue lights, it did not capture the field sobriety test administered, and it did not show probable cause for the arrest. Specifically at minute marker 1:00 to 3:40, The Appellant argued that Trooper Cwynar was the official arresting officer, but that his video did not comply with the Statute because the activation of the blue lights for the initial stop of the Appellant was initiated prior to Trooper Cwynar arriving on the scene to administer the field sobriety test. Abbeville County Police Department conducted the initial stop, but the Appellant received no discovery from these officers. The Magistrate then at minute marker :30-1:34 denied both the motion to dismiss based on Rule 5 *Brady* violations and S.C. Code Sections 56-5-2953 (A &B). The Magistrate's reasoning being that the video begins when Trooper Cwynar arrives on scene. This denial of the Appellant's motion was in error as the activation of the blue lights in this case occurred prior to Trooper Cwynar arriving on scene, which negates the probable cause portion of 56-5-2953(A). The video provided by Trooper Cwynar did not include evidence of impaired driving which is a crucial aspect to the Appellant's defense and S. C. Code Section 56-5-2953(A). The Appellant further argued during a Motion for a Directed Verdict, that there was never a showing throughout of trial of probable cause that the Appellant was even driving or suffered from impaired driving due to the lack of video evidence prior to Trooper Cwynar arriving on scene after the activation of blue

lights and the traffic stop by Abbeville County Police Department. (Minute Marker 53:39 to 57:05). During Cross Examination beginning at Minute Marker 40:10, Trooper Cwynar stated that he conducted a Horizontal Gaze Nystagmus due to that being the only field sobriety test that the Appellant could complete. When asked by the Appellant why Trooper Cwynar failed to pull his patrol car into view so that the video could capture the field sobriety test, Trooper Cwynar stated that he thought the video would be of better quality than what was given to the Appellant in discovery and what was presented at trial. (Minute Marker 43:00). Trooper Cwynar agreed with the Appellant that he could have pulled his patrol car up so that the Horizontal Gaze test could be viewed better, but it still would not show the eye balls move. (Minute Marker 45:00). This testimony from Trooper Cwynar indicated that the Appellant's earlier assertion that he violated South Carolina Code Section 56-5-2953(A).

For these reasons the Magistrate erred by finding that the State had complied with S.C. Code Section 56-5-2953(A).

3. The Magistrate erred by finding that the State had not violated S.C. Code Section 56-5-2953(B).

South Carolina Code Section 56-5-2953(B) states:

(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.

The South Carolina Supreme Court in *Town of Mt. Pleasant v. Roberts* stated, "Taking into consideration the purpose of section 56-5-2953, which is to create direct evidence of a DUI arrest..." 393 S.C. 332 (2011). The Court further stated that compliance with S.C. Code Section 56-5-2953 is a mandatory obligation for law enforcement and not optional. *Id. referring to City of Rock Hill v. Suchenski*, 374 S.C. 12 (2007).

As discussed above, by failing to meet the requirements of S.C. Code Section 56-5-2953(A) and committing Brady violations, the State in effect violated S.C. Code Section 56-5-2953(B), because there was no sworn affidavit for why there was no complete video of the incident site or impaired driving by the Abbeville County Police Department. The Rule 5 Discovery request sent by the Appellant should have included the complete incident site report recording including the initial traffic stop by Abbeville County Police Department. The Magistrate Court erred by ruling that the State complied initially with S.C. Code 56-5-2953(A &B) by ruling that that video recording of the incident site provided to the Appellant began as soon as practicable on the scene when Trooper Cwynar arrived. The Magistrate also agreed with the Appellant that there was no

direct evidence to charge the Appellant with Driving Under the Influence and ruled that the circumstantial evidence was one for the jury to decide on, which is a direct contradiction to the purpose of S.C. Code Section 56-5-2953(A&B) as indicated by the South Carolina Supreme Court in *Roberts*. (Minute Markers 56:30-57:00).

Therefore the Magistrate erred by ruling that the State had not violated S.C. Code Section 56-5-2953(B).

4. The Magistrate erred in denying the Appellant's Motion for Dismissal as stated above in nos. 1-3.

As stated above in nos. 1-3, the Magistrate erred in denying the Appellant's Motion for Dismissal because there was a failure to comply with S.C. Code Sections 56-5-2953(A&B) and a failure to comply with the Appellant's *Brady* Discovery request.

5. The Magistrate erred in denying the Appellant's Motion for a Directed Verdict as stated above in nos. 1-3.

As stated above in nos. 1-3, The Magistrate erred in denying the Appellant's Motion for a Directed Verdict as the State failed to initially show probable cause by not including any video surveillance by the Abbeville County Police Department. The Magistrate also erred by failing to rule that the State complied with S.C. Code Sections 56-5-2953(A&B) and with the Appellant's *Brady* Discovery Request.

CONCLUSION

Appellant respectfully requests that this Court reverse his conviction.

Respectfully submitted,

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February 14, 2022

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< Sent



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Michael E. Sanders Initial Brief

Hello,

Below I have attached a copy of the initial brief for Mr. Sanders Appeal and the certificate of service. If you have any questions please feel free to reach out to me.

Best Regards,

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