STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Newberry County
Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking No. 2012-212643

The State, Appellant,

vs.

Woodrow Mozee, Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The magistrate properly denied the motion to dismiss based on the fact a videotape was produced which complied totally with section 56-5-2953(A) of the South Carolina Code and the circuit court erred in reversing this decision, vacating Respondent's conviction, and dismissing the case.

II. The magistrate properly denied the motion to dismiss based on the Trooper marking the breath test as refused and the circuit court erred in reversing this decision, vacating Respondent's conviction, and dismissing the case under section 56-5-2950 of the South Carolina Code.

III. The magistrate properly denied the motion to dismiss the ABC violation for an open container because a violation of South Carolina Highway Patrol Policy does not go to the admission of the evidence, but only its weight and the circuit court erred in reversing this decision, vacating Respondent's conviction, and dismissing the charge as a violation of this Policy.

STATEMENT OF THE CASE

Trooper Turner arrested Respondent for driving under the influence (DUI) and an open container violation on January 8, 2011. Respondent proceeded to trial before the Honorable Ronald C. Halfacre, Magistrate in Newberry County. Respondent was represented by Pete G. Diamaduros and the State was represented by Assistant Solicitor Rosemerry Felder-Commander. Respondent was convicted of both charges on July 15, 2011.

Respondent filed an appeal to the Court of Common Pleas on July 27, 2011. The Honorable Eugene C. Griffith, Jr., heard the appeal on March 12, 2012. The parties were represented by the same counsel. After hearing argument, Judge Griffith vacated Respondent's conviction and dismissed the charges against Respondent by Order filed April 20, 2012. The State filed its Notice of Appeal from this Order on May 15, 2012.

ARGUMENT

I. The magistrate properly denied the motion to dismiss based on the fact a videotape was produced which complied totally with section 56-5-2953(A) of the South Carolina Code and the circuit court erred in reversing this decision, vacating Respondent's conviction, and dismissing the case.

The circuit court erred in finding the State failed to produce a complete videotape and failed to comply with the provisions of section 56-5-2953(A) of the South Carolina Code. The circuit court improperly added requirements to the section and erred in vacating Respondent's conviction and dismissing his case on this ground. The videotape produced, as found by the magistrate court, complies fully with the statute and, therefore, the magistrate court properly denied the motion to dismiss. This Court should reverse the circuit court's decision and reinstate Respondent's conviction.

Section 56-5-2953(A) of the South Carolina Code requires:

> 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) <u>not begin later than the activation of the officer's blue lights;</u>
> > (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 Ann. § 56-5-2953(A) (Supp. 2011)(emphasis added). Section 56-5-2953(B) of the South Carolina Code requires the officer to produce the videotape or submit an affidavit explaining the failure to produce the videotape. See S.C. Code Ann. § 56-5-2953(B) (Supp. 2011) ("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 cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)).

> All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. A statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself.

State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) (internal citations omitted).

"The legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted). "Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language." City of

Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) (citing Timmons v. Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970)).

The language of section 56-5-2953 is clear and unambiguous. It delineates what is to be included in the video of the incident site.[1] The statute clearly states the video recording at the incident site must "not begin later than the activation of the officer's blue lights." The section makes no reference to the video recording having to begin immediately upon the officer seeing a violation or upon the officer manually turning on the camera. The clear, unambiguous language of the statute solely requires the video to begin upon activation of the officer's blue lights. The reading proposed and utilized by the trial court to find error and to dismiss the case injects requirements into the statute that were not placed in the statute by the legislature.

In this case, the Trooper testified he was travelling on Highway 773 and witnessed Respondent driving his pick-up truck left of center. He said as he approached a turn in the road, he attempted to manually turn on the camera in his car. The Trooper testified the camera takes a moment to activate when you turn it on manually, as opposed to beginning automatically with the initiation of his blue lights. In this case, the camera was initiated, at the latest, upon the activation of the blue lights. (Audio Recording of Magistrate's Trial). Counsel for Respondent, however, maintained the video tape was deficient because it did not include a recording of everything the trooper witnessed and did not include the portion of Respondent's driving the Trooper attempted to obtain by manually turning on the camera. (3/12T.2-3; 11-12; R.___).

[1] Respondent never challenged whether the incident site videotape included the field sobriety tests being performed, his arrest, or the reading of his Miranda rights.

The videotape began upon the activation of the Trooper's blue lights and included all components of the incident site required by section 56-5-2953(A)(1). Counsel for Respondent even concedes the video began with the Trooper's blue lights. (3/12T.11; R.___). Any failure to record the behavior of Respondent prior to the initiation of the blue lights merely goes to the weight of that evidence and not its admissibility under section 56-5-2953. Further, the failure to record what he has no obligation to record under the statute is not a basis for dismiss under City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007).

Finally, if the circuit court's interpretation is followed, it would lead to an absolutely absurd result because the officer or trooper would be required to anticipate a stop before having the evidence of one so as to record all aspects of the individual's driving. Basically, the circuit court's ruling would require the cameras in the officer's vehicle to be recording non-stop while the officer is using the vehicle. This is an absurd result clearly not intended by the Legislature. The fact the Legislature did not intend constant videotaping, or even videotaping prior to the officer making the determination he was going to stop an individual, is highlighted by the fact the statute requires only that the camera must be activated when the officer activates his blue lights. Any other reading leads to an absurd result. See State v. Long, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005) ("The legislature is presumed to intend that its statutes accomplish something."); Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (finding courts will reject an interpretation of a statute leading to an absurd result clearly unintended by the legislature); State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454

(Ct. App. 2011) ("The statute must be interpreted with realistic circumstances and rationales in mind.").

The circuit court committed clear error in finding the recording provided was insufficient. As a result, the court erred in vacating Respondent's conviction and dismissing the DUI charge on this ground. This Court should reverse the circuit court's determination and reinstate Respondent's conviction.

II. The magistrate properly denied the motion to dismiss based on the Trooper marking the breath test as refused and the circuit court erred in reversing this decision, vacating Respondent's conviction, and dismissing the case under section 56-5-2950 of the South Carolina Code.

The circuit court erred in finding Trooper Turner violated SLED policy when he marked Respondent's test as a refusal. As the Magistrate found, Trooper Turner provided ample testimony demonstrating why he marked Respondent's test as a refusal instead of an incomplete and was in full compliance with SLED policy. Finally, nothing in section 56-5-2950 provides for the dismissal of the charges based on a violation even if one occurred.

Section 56-5-2950 provides in part:

> (A) A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs. . . . A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs. At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. <u>If</u> the person is physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer <u>may</u> request a blood sample to be taken. . . . The breath test must be administered by a person trained and certified by the South Carolina Criminal Justice Academy, pursuant to SLED policies.
>
> . . . .
>
> (J) Policies, procedures, and regulations promulgated by SLED may be reviewed by the trial judge or hearing officer on motion of either party. The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence of any test results, if the <u>trial judge</u> or <u>hearing officer</u> finds

> that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure and the court trial judge or hearing officer rules specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure.

S.C. Code Ann. § 56-5-2950 (A) & (J) (Supp. 2011).

The SLED policy relied upon by Respondent provides:

> If an acceptable breath sample is not provided in two minutes, the instrument will display "Did the subject refuse?" When question is prompted, press the touch-screen icon, "Yes" or "No". If "Yes" is answered, the instrument will print "REFUSED" by "SUBJECT SAMPLE", after the final steps of the operational protocol are completed. This is considered a completed test and signature lines will be printed on the Breath Alcohol Analysis Test Report/Evidence Ticket. If "No" is answered, the test will abort and the instrument will print "INCOMPLETE SUBJECT TEST" on the Breath Alcohol Analysis Test Report/Evidence Ticket. An "INCOMPLETE SUBJECT TEST" reading, by itself, is not a refusal situation. (A "NO" should only be entered if the subject failed to provide an acceptable breath sample through no fault of his/her own.) In the event of an "INCOMPLETE SUBJECT TEST", the breath test sequence may be repeated, except the advisement process is not required to be repeated. This is not a completed test and not signature lines will be printed.

SLED Policy, 8.12.5.L.2.f.VII (2009) (emphasis added).[2]

First, Trooper Turner did not violate the SLED policy by marking the test as a refusal and provided ample explanation for why he chose refusal over incomplete. It is entirely within the discretion of the Trooper whether to select "Yes" it was a refusal or "no" it was not a refusal and instead was an incomplete test. As the State pointed out, the policy specifically states: "A 'NO' should only be entered if the subject failed to provide

[2] The policy may be found at http://www.sled.sc.gov/documents/impliedconsent/polproc/8125/200902108125.pdf

an acceptable breath sample through no fault of his/her own." In this case, Trooper Turner testified extensively regarding his belief Respondent was not trying to blow, was breathing in at times instead of breathing out, and was trying to avoid the test. (Audio Recording of Magistrate's Trial). He indicated Respondent never asked for his inhaler, and Trooper Turner never noticed any wheezing or difficulty breathing by Respondent. Finally, Trooper Turner testified he considered the fact Respondent was able to blow enough for a continuous tone though not enough for a sample to be taken, but was then able to immediately launch into verbal attacks and rants without being out of breath. He testified he did not believe Respondent was trying.

As a result, there was clearly testimony in the record demonstrating Trooper Turner used his discretion in selecting "Yes" that Respondent refused the test, and the Magistrate Court properly denied the motion to dismiss. The circuit court, sitting as the appellate court, clearly interjected his factual determinations for those of the Magistrate instead of determining whether there was evidence to support the Magistrate's finding. As shown above, there is clearly evidence supporting the Magistrate Court's conclusion.

Additionally, the circuit court committed an error of law in its interpretation of SLED policy as well as section 56-5-2950. The circuit court found "under the circumstances of this case SLED Regulation 8.12.5.L.2.f.VII required the officer to answer "No" so the test could be aborted and a new test could be attempted." As the State noted, nothing in the language of the SLED policy mandates a selection of "Yes" or "No" at any time. The only instruction in the SLED policy indicates "A 'NO' should only be entered if the subject failed to provide an acceptable breath sample through no fault of his/her own." As a result, the circuit court erred in finding the policy mandated

any selection by the Trooper. As discussed above the evidence in the record amply demonstrated the Trooper exercised his discretion and in his opinion Respondent was refusing the test by failing to give a complete sample.

In addition, the circuit court misconstrues section 56-5-2950 to require dismissal of the charges. Nothing in this section provides for dismissal of the case even if a violation of the section or SLED policy is found. The extent of the remedy is the exclusion of the test result. Additionally, this determination is to be left to the trial judge or hearing officer, in this case the Magistrate Court Judge. He specifically found the issue, including whether Respondent was unable to perform the test or the Trooper correctly marked refusal, was for the jury and denied Respondent's motion. (Audio Recording of Magistrate's Trial). Accordingly, the circuit court incorrectly dismissed the case even if a violation could be found.

Further, any error in following policy and the selection made by Trooper Turner would inure to the weight of the evidence and not its admissibility. Defects in procedure generally do not affect admissibility. See, e.g., State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

Respondent's counsel was able to fully cross-examine Trooper Turner regarding the breath test and his marking the test a refusal. He asked the Trooper about his comments in his notes that "During the two minute duration [Respondent] was unable to give a sufficient sample that resulted in refusal." Respondent testified regarding the circumstances of the test.

The judge instructed the jury that there was a right to refuse the breath test, and explained the jury may give whatever weight it chose to a refusal, if it found the refusal

to exist. (Audio Recording of Magistrate's Trial). As a result, the issue was clearly placed before the jury and it was for the jury to make a determination of who they believed and the weight ascribed to the refusal.

It is not error to admit into evidence a defendant's refusal to submit to a breathalyzer test. State v. Miller, 257 S.C. 213, 185 S.E.2d 359 (1971). Moreover, in light of the overwhelming evidence of his intoxication, Respondent was not prejudiced by the admission of his refusal to submit to the breathalyzer. See State v. Degnan, 305 S.C. 369, 409 S.E.2d 346 (1991). Accordingly, this Court should find the circuit court erred in vacating the conviction and dismissing Respondent's DUI charge because Trooper Turner exercised proper discretion, provided ample testimony in support of that discretion, and the Magistrate properly denied any motion to dismiss.

III. The magistrate properly denied the motion to dismiss the ABC violation for an open container because a violation of South Carolina Highway Patrol Policy does not go to the admission of the evidence, but only its weight and the circuit court erred in reversing this decision, vacating Respondent's conviction, and dismissing the charge as a violation of this Policy.

The circuit court erred in vacating Respondent's conviction for the ABC violation for an open container and in dismissing the charge. The Magistrate Court correctly allowed the evidence to be presented to the jury and correctly denied the motion to dismiss the charge because any violation only goes to the weight of the evidence and not its admissibility.

After pulling Respondent over on suspicion of DUI, Trooper Turner located what appeared to be an open container of liquor. The Trooper placed the bottle in front of the camera and described it on camera. The bottle indicated it was Rich & Rare Canadian Whiskey and was approximately three-fourths full. The Trooper testified it had the distinct odor of liquor. (Audio Recording of Magistrate's Trial). Trooper Turner poured out the bottle of liquor and disposed of the bottle. Respondent testified he did not know the bottle was in his coat pocket, but he never disputed whether it was alcohol. (Audio Recording of Magistrate's Trial).

The magistrate allowed the evidence to be presented to the jury and then denied Respondent's motion to dismiss the charge, which the Magistrate treated like a directed verdict motion. He found the State presented evidence regarding the open container and its contents and it was for the jury to determine whether they believed it was alcohol in the bottle. (Audio Recording of Magistrate's Trial).

The circuit court found South Carolina Highway Patrol Policy 300-15 provides "alcoholic beverages seized as evidence are to be placed in evidence bags and sealed with evidence tape and stored in an authorized area until the time of trial or time of disposal." He found Trooper Turner failed to follow this policy and as a result had no evidence as to whether the liquid in the container was alcoholic liquor or any liquid containing a percentage of alcohol by volume. (Order of Circuit Court; R.___).

The circuit court erred in finding the policy mandated dismissal and in finding the Trooper failed to present evidence of the contents of the bottle sufficient to send the issue to the jury. First, violations of policy go solely to the weight of the evidence and not to the admissibility of the underlying evidence. See, e.g., State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)). Second, the Magistrate correctly found, in the light most favorable to the State, that the officer presented evidence from which it could be concluded the liquid in the container contained alcohol, and therefore, he properly denied the motion to dismiss or for directed verdict.

In State v. Huntley, the South Carolina Supreme Court discussed the failure to utilize the proper standards for setting a Datamaster breathalyzer machine. The standard required an alcohol concentration amount of .08 as the test amount. The lab utilized an alcohol concentration amount of .10 as the test amount instead. The court found the incorrect standard being applied went to the weight of the evidence and not to its admissibility. State v. Huntley, 349 S.C. 1, 5-6, 562 S.E.2d 472, 474 (2002). Similarly, whether the policy was followed was argument for counsel to provide to the jury and Respondent's counsel effectively articulated his belief the jury should acquit Respondent

because the State disposed of the liquid and the bottle. The jury just did not accept the argument.

The Magistrate correctly determined the officer provided evidence of the contents of the bottle sufficient to survive a motion to dismiss or for directed verdict. "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593-593, 606 S.E.2d 475, 477-478 (2004). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id.

In the instant case, Trooper Turner testified the bottle was a Rich and Rare Canadian Whiskey bottle. He testified it was approximately three-fourths full and showed the bottle for the camera. He also testified the liquid being poured out of the bottle had the distinctive smell of alcohol or liquor. Respondent testified he did not realize the bottle was in his coat, but never challenged the assertion it was alcohol that was in the bottle. Accordingly, the State presented sufficient evidence justifying the Magistrate's denial of the motion and the circuit court erred in its holding the "officer had no evidence" to support the charge. Therefore, this Court should reverse the finding of the circuit court, affirm the Magistrate's denial of the motion, and reinstate Respondent's conviction on the open container charge.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the circuit court vacating Respondent's convictions and dismissing the charges against him should be reversed and his convictions and sentences reinstated.

Respectfully submitted,

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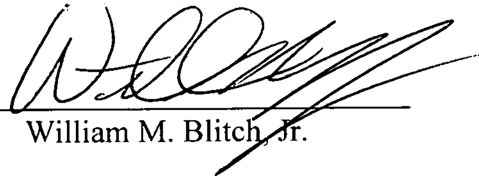

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April 29, 2013