

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2018-002242

THE STATE,

Respondent,

v.

PHILLIP WAYNE LOWERY,

Appellant.

**MOTION TO ALLOW THE STATE TO
SUPPLEMENT RECORD ON APPEAL**

The State through its undersigned counsel, would respectfully show unto the Court as follows:

I.

On June 5, 2018, Appellant was indicted by the Greenville County Grand Jury for driving under the influence. On December 12-13, 2018, Appellant proceeded to a jury trial before the Honorable Robin B. Stilwell. The Jury found Appellant guilty as charged and the trial judge sentenced him to two years' incarceration.

II.

On appeal, Appellant has raised two separate issues, however the second issue is the purpose of this motion. Appellant contends that "the trial court erred in failing to dismiss Appellant's charge, where the dashcam video failed to comply with the driving under the

influence statute and did not include all of the field sobriety tests administered or any of the officers reading Appellant his Miranda Rights.” There were two dash cam videos. The first was Officer Vallin’s Dashcam video that showed his questioning of Appellant. Vallin then turned Appellant over to Trooper McNeely to conduct the field sobriety tests. The second dashcam video is a recording of the field sobriety tests and ultimately the Miranda warnings. Trial counsel had concerns regarding the characterization of the prior car accident, that led to this investigation, within the recordings. After hearing those concerns, the trial judge instructed the parties to redact the portions of the recording which unnecessarily discussed the earlier traffic incident. The trial judge made it clear that he wanted the parties to discuss any and all issues with the video recordings and send him an email before the trial began in earnest the following day. (R. p. 23, Line 12-R. p. 32, line 16; R. p. 39, lines 3-23; R. p. 47, line 14-R. p. 50, line 15).

Through Trooper McNeely’s testimony, the State admitted the dashcam recording of the tests he performed on Appellant along with the conversation between the two men. (R.p.70). When asked whether the defense counsel had any objections, defense counsel had none provided the agreed redactions were performed on it. (R. p. 64-72). In Trooper McNeely’s testimony he would explain the test he performed and then that portion of the video would be shown to the trier of fact. (R. p. 64-72). Trooper McNeely then testified that after Appellant was arrested and placed in handcuffs, he issued him Miranda warnings. However, when the State tried to play that portion of the video, the State requested an off-the-record bench conference. (R. 74). When the parties returned, the trial judge announced the State was having technical difficulties with playing that portion of the recording. (R. 74). However, Trooper McNeely confirmed that the video did record and showed him providing Appellant with Miranda warnings. (R. 75).

Defense counsel did not lodge any objection to playing the recording despite the State's inability to display the portion showing the Miranda warnings. (R. 74-75). After the State rested its case, defense counsel moved for a directed verdict claiming the State failed to provide evidence other than Appellant's own statements that he was driving the vehicle but made no objection relating to the admission of Trooper McNeely's recording. (R. 83-85). It was not until after the defense presented its case that defense counsel then again moved for a directed verdict, this time for failure to play the portion of Trooper McNeely's recording, which showed him issuing the Miranda warnings. (R. 117). Defense counsel claimed he did not object previously because he did not know how the video was "going to play out" and did not know what was on the video and what could or could not be played. (R. 116-117). Defense counsel maintained that the DUI statute required the issuance of Miranda warnings be recorded and such recording needs to be shown to the trier of fact. (R. 116-117).

In response, the State noted that the recording issue was addressed at bar, on the record, just shortly before and that the State along with trial counsel redacted the video together the night before to ensure the parties complied with the trial judge's pretrial rulings. As a result Appellant knew the Miranda warnings were contained in the recording. (R. 117).

III.

Pursuant to Rule 212(b), SCACR, the State moves for the leave of this Court to supplement the record on appeal to include the Trooper McNeely's unredacted dashcam video. There is evidence in the record that the video exists and was before the trial court even though it was not admitted as an exhibit at trial. There is evidence that the State and defense counsel had both seen the full unredacted video. The statute governing the video recording of a DUI offense, section 56-5- 2953 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;

(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 can show the person being advised of his Miranda rights.

...

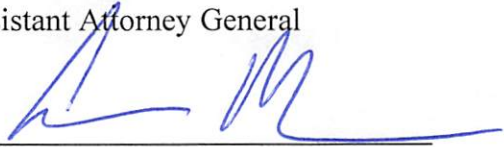
S.C. Code Ann § 56-5-2953(A). The State respectfully submits that it is important for this Court to review the full unredacted video that the State and defense counsel had access to in order to determine whether the State properly complied with the DUI statute. Therefore, the State requests leave from this Court to supplement the record on appeal with Trooper McNeely's full unredacted dashcam video.

WHEREFORE, Respondent prays that this Court will allow the State to supplement the Record on Appeal with a copy of the full unredacted video; accept the filing of the State's copy of the video; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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April 21, 2022

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Motion to Allow the State to Supplement Record on Appeal on Appellant by emailing a copy to Appellant's counsel of record, Taylor Gilliam, at his primary email address as provided by the Attorney Information System.

I further certify that all parties required by Rule to be served have been served.
This twenty-first day of April, 2022.



Caroline Collins
Administrative Coordinator
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Caroline Collins

From: Caroline Collins
Sent: Thursday, April 21, 2022 5:20 PM
To: 'Gilliam, Taylor'
Cc: Ambree Muller; William Blich; 'Warren, Kaylynn'
Subject: The State v. Phillip Wayne Lowery (2018-002242)
Attachments: Lowery Phillip - 2018-002242 - Motion to Allow the State to Supplement Record on Appeal (02961028xD2C78).PDF

Good Afternoon Mr. Gilliam,

Attached please find a Motion to Allow the State to Supplement Record on Appeal in The State v. Phillip Wayne Lowery (2018-002242). This motion will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System. A copy of the video will be provided to the Court tomorrow. Please let me know if your office is also in need of a copy.

If you will, please reply to confirm receipt.

Thank you!

CAROLINE COLLINS, Administrative Coordinator
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