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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stilwell., Circuit Court
Judge Appellate Case Tracking No. 2018-002242
Opinion No. 5983

State of South Carolina, Respondent,

vs.

Phillip Wayne Lowery, Appellant.

PETITION FOR REHEARING

On April 6, 2022, this Court in a published opinion State v. Lowery, Opinion No. 5903 (filed April 6, 2022) (Shearouse Adv. Sh. No. 12 at 72) reversed and remanded Appellant's conviction for driving under the influence finding the trial court abused its discretion in admitting statements Appellant made on a dash camera recording and the State failed to comply with the DUI statute regarding a second dash camera recording. This Court misapprehended the relevant standard of review regarding whether Appellant was in custody and the need for Miranda at the time he gave the relevant statements. Additionally, this Court overlooks relevant facts supporting the trial court's determination that Appellant was not in custody at the time the statement at issue was given. Finally, this Court misapprehends or overlooks the statutory requirements related to the video of the incident scene and the fact nothing in the statutory scheme requires the video be played for the jury.

Accordingly, pursuant to Rule 221(a), SCACR, this Court should grant the State's petition for rehearing and affirm Appellant's conviction because the trial court did not err in admitting statements from the dash cam and did not err in denying Appellant's motion for a directed verdict due to noncompliance with the DUI statute regarding a second dash camera recording.

Admissibility of Statements

While this Court acknowledges the basic standard of review, this Court's opinion completely disregards the standard of review and fails to give the trial court's determination the appropriate deference. The appellate court does not re-evaluate the facts based upon its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by **any evidence.** (Emphasis added). State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2008). The trial judge ruled that the statements made on the dash cam were admissible in part because Appellant was not in custody. As a result, this Court is to determine if there is any evidence to support this finding by the trial court and not conduct a de novo review to determine if this Court would ultimately agree with the trial court's ruling. See State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003) ("Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is supported by the record.").

This court relies on the thirteen factors set forth in Williams to determine whether an interrogation was "custodial" yet fails to address eight of the thirteen factors and fails to give the trial court's ruling its proper deference. State v. Williams, 405 S.C. 263, 747 S.E.2d 194, 199 (Ct. App. 2013). The first factor is whether the contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to interview. Id. In its analysis, this court stated that "the interrogation was initiated by Vallin" State v. Lowery, Opinion No. 5903 (filed April 6, 2022) (Shearouse Adv. Sh. No. 12 at 79). This court neglected

to address the fact that Appellant voluntarily pulled in to the gas station, Officer Vallin did not conduct a traffic stop of Appellant, he merely arrived at the same gas station as Appellant. Significantly, Appellant never hesitated to speak to Officer Vallin and did not indicate that he was unwilling to talk to Vallin. This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The second factor under Williams is whether the express purpose of the interview was to question the person as a witness or suspect. The court states "Lowery was being questioned as a suspect rather than as a witness." State v. Lowery, Opinion No. 5903 (filed April 6, 2022) (Shearouse Adv. Sh. No. 12 at 79). On the contrary, Lowery was not being questioned as a suspect for DUI, he was being questioned in connection with a car accident. Under this Court's analysis, anytime an accident is being investigated, Miranda warnings would be required prior to discussing the accident. This is not and should not be the case. See State v. Barksdale, 433 S.C. 324, 857 S.E.2d 557 (Ct. App. 2021) and State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984). This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The third factor under Williams is where the interview took place. Although this Court does not address this factor in its analysis, it's important to note that the interview took place in a gas station which is a much more public place than the side of the road. The United States Supreme Court has previously held that a traffic stop, although a "seizure," was not a situation considered unduly coercive which required the issuing of Miranda warnings because it is presumptively temporary and brief compared to an interrogation in a police station which is presumptively long, and the circumstances are not such that the motorist feels he or she is completely at the mercy of the police because of the public location and presence of witnesses. Berkemer v. McCarty, 468 U.S. 420 (1984). A gas station parking lot is even more public than the side of the road at a traffic

stop and is more temporary than the inside of an interrogation room. This is additional evidence supporting the trial judge's ruling that Appellant was not in custody.

The fourth factor, whether the police informed the person he or she was under arrest or in custody, is another factor that this Court does not address in its analysis. Not only does this Court not address it, but it completely ignores the statement made by Officer Vallin in the dash cam video "okay well we don't know if we're arresting you yet so just hang on for that okay?" (State's Exhibit 1 at 4:29) This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The fifth Williams factor is whether law enforcement officers informed the person he or she could terminate the interview and leave at any time or whether the person's conduct indicated an awareness of such freedom. This Court did not address this factor, but the State acknowledges Appellant was never specifically told he could leave, so this factor could support a finding of custody.

The sixth factor concerns whether there were restrictions on the individual's freedom of movement during the interview. In the analysis of this factor, this Court completely misstates the facts. This Court states Appellant was "denied his request to use the telephone or the restroom." While he was denied his request to use the telephone, after incriminating statements were already made, nowhere in State's Exhibit 1 dash cam footage with Officer Vallin does Appellant request to use the restroom. In State's Exhibit 2, while he is in the middle of his field sobriety tests, he does ask to use the restroom and is denied, but this is well after his incriminating statements. The custody determination is whether a person is in custody at the time of his statements not whether he was ever in custody. In State v. Kerr, Appellant argued that his statements admitting that he had been drinking should have been suppressed because he was in custody at the time of his

statements and should have been given Miranda warnings. This court held that a defendant was not "in custody" at the time he made the statements to the Officer because the officer was performing a routine investigation into the cause of a traffic accident when Appellant stated to the officer that he had been drinking. State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998). Custody Determination is made at the time the statements are made not whether the defendant is ever in custody. Further, this Court fails to address that Appellant was neither handcuffed nor sitting in a police car at the time of the questioning. In fact, Officer Vallin allows him to smoke a cigarette (is he walking around in the public gas station parking lot or is he cornered or completely surrounded?) during this time. (State's Exhibit 1). This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The seventh factor is the length of the interrogation. The Court does not address this factor in its analysis and likely because it clearly favors the judge's ruling as the entire questioning by Officer Vallin lasted approximately six minutes and the first incriminating statement is made within 26 seconds. This evidence supports the trial judge's ruling that Appellant was not in custody.

The eighth factor is the number of officers participating. The Court embellishes its analysis of this factor and states "he was surrounded by numerous officers" yet fails to address that only one officer is asking questions and actually participating in the interview. Further, although there was testimony that there were two or three deputies around Appellant only one was close enough to him to be visible or heard in the dash cam video. "Additionally, the presence of multiple officers at the scene of an accident has not deterred our appellate courts from finding a DUI suspect was not in custody while being questioned in the presence of multiple police officers." State v.

Barksdale, 433 S.C. 324, 336, 857 S.E2d 557, 563 (Ct. App. 2021). This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The ninth factor is whether law enforcement dominated and controlled the course of the interrogation. This Court did not address this factor in its analysis. A review of the beginning of State's Exhibit 1 when the relevant statements were made clearly demonstrates Officer Vallin and Appellant were having a conversation. Vallin was not peppering Appellant with questions. Some of Appellant's statements were made without being prompted by a question. This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The tenth factor is whether law enforcement manifested a belief that the person was culpable and had the evidence to prove it. In its analysis of this factor, this Court adopts trial counsel's language in stating that "Vallin admitted his interrogation was accusatory." State v. Lowery, Opinion No. 5903 (filed April 6, 2022) (Shearouse Adv. Sh. No. 12 at 79). Vallin testified "from the evidence I saw I did believe that he was involved." Id. at the Jackson v. Denno hearing prior to trial. That fact was not made known at the scene and more importantly it was not made known to Appellant until Vallin testified at the Jackson v. Denno hearing. See Barksdale. This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The eleventh factor is whether the police were aggressive, confrontational, or accusatory. The Court somewhat addresses this factor in the statement regarding Vallin's testimony being accusatory, however in watching the dash cam footage, Vallin's demeanor and tone in his questioning is the exact opposite of aggressive, confrontational, and accusatory, and is extremely understanding and conversational. (State's Exhibit 1). This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The twelfth factor is whether the police used interrogation techniques to pressure the suspect. This Court does not address this factor in its analysis again likely because it supports the judge's ruling that Appellant was not in custody because no interrogation techniques were used. As already mentioned, Officer Vallin and Appellant merely entered into a conversation regarding the automobile accident and Appellant's possible involvement.

The thirteenth factor is whether the person was arrested at the end of the interrogation. Again this factor is not addressed in this Court's analysis. Appellant was not arrested at the end of the interrogation. He was passed off to another officer to go through the field sobriety tests. This is evidence supporting the trial judge's ruling that Appellant was not in custody.

This court stated it looked at the totality of the circumstances through these thirteen factors, however they completely neglected to address eight of the thirteen factors. This court oversteps its power by disregarding the standard of review as it is not this court's job to completely reevaluate the facts to determine whether Appellant was in custody, but to determine if there is **any evidence** that supports the trial court's ruling that the statements were admissible based on Appellant not being in custody. Twelve of the thirteen factors have clear evidence supporting the trial judge's ruling. Therefore, this court should reconsider the ruling that the trial judge erred in admitting statements from the dash cam video, and find in accordance with its standard of review, that there exists evidence to support the trial court's determination.

Section 56-5-2953

On appeal, Appellant argues that the trial judge erred by denying Appellant's motion to dismiss. That is not the issue that was raised at trial. At trial, trial counsel moved for a directed verdict for failure to meet the requirements under section 56-5- 2953. This is the issue that should have been ruled upon. (R. 117). A defendant is entitled to a directed verdict when the State fails

to produce evidence of the offense charged. The offense charged was driving under the influence (S.C. Code Ann §56-5-2930(A). The elements of the DUI offense that the State must prove are a person must, drive a motor vehicle within this state and be under the influence of alcohol, drugs, or a combination to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired. Id. There is certainly evidence supporting all of the required elements of DUI and Appellant has not alleged that the State has failed to establish any of the elements. As a result, this Court should reconsider its ruling and find the trial court did not err in denying the motion for a directed verdict.

First, this Court ruled that a dismissal was not required, but for the wrong reason. This Court relies on the reasoning in State v. Taylor[1] that the remedy for the failure to meet a statutory requirement is not dismissal, however a dismissal isn't required here because trial counsel asked for a directed verdict and compliance with a procedural requirement is irrelevant for the purposes of a directed verdict. Showing a recorded video of the field sobriety tests and Miranda warnings is not an element of the DUI offense and therefore a directed verdict would be improper.

Second, this Court attempts to add a requirement to the procedural prerequisite for the State that is nowhere in the statute. This Court ruled that the second, redacted dash cam video played only at trial failed to comply with the DUI statute. 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

[1] State v. Taylor 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014).

> 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). Nowhere in the statute does it state that this video must be shown to the trier of fact. This Court quotes State v. Kinard stating the purpose of this statute is twofold: "The first purpose is to create direct evidence of a DUI arrest by requiring the video include any field sobriety tests administered. The other purpose... is to protect the rights of the defendant by 'requiring video recording of the person's arrest and of the officer issuing Miranda warnings." State v. Kinard, 427 S.C. 367, 372, 831 S.E.2d 138, 140-141 (Cr. App. 2019). "The purpose" of the video is not to show to the trier of fact, but to provide the defendant with what evidence the State has against him and to protect his rights by allowing him to make an informed decision on whether to proceed to trial knowing all of the evidence against him. There is no requirement the State play any portion of the video for the jury and if the State sought to prove its case entirely based on other evidence it is free to do so. This Court's opinion seems to put a requirement on how the State prosecutes its case and presents its evidence and this is a decision for the prosecutor and not the judiciary. "In carrying out his duty, the prosecutor independently decides whether to prosecute, decides what evidence to submit to the court, and negotiates the State's position in plea bargaining. In re Richland County Magistrates Court, 389 S.C. 408, 411, 699 S.E.2d 161 (2010).

By adding the requirement that the video recording of the field sobriety tests and Miranda warnings must be shown at trial, this court oversteps its authority by telling the State how they must present their case. Nothing in the statute requires the video recording be shown to the trier of fact, but rather that it simply must exist. "The video recordings of the incident site and of the breath test site **are admissible** pursuant to the South Carolina Rules of Evidence in a criminal, administrative, or civil proceeding by any party to the action." (Emphasis added) S.C. Code Ann

§56-5-2953(3). The statute states the video recordings are admissible not that they must be admitted as this Court is indicates.

Third, the full video produced by the arresting officer does comply with the statute. There is a video that was turned over to Appellant which shows all of the field sobriety tests as well as Appellant being Mirandized; however at trial there were technical issues, and it just wasn't played for the trier of fact because of computer issues. It is clear from the record however that there is a full video.[2] First, had the video been incomplete prior to trial, trial counsel would have made a pretrial motion to dismiss because the video did not comply with the DUI statute. No such pretrial motion was made. Further, there is discussion about making redactions to the video with the field sobriety tests because at the beginning of the video there is some discussions about a hit and run and the damage to the vehicle. (R. 47-49) Later, trial counsel claims "I don't know what is on that video and what can and can't be played" (R. 117). Trial counsel then makes his directed verdict motion for failure to meet the requirements under the DUI law. (R. 117). The State responds by stating that the State and trial counsel made the redactions together and both know what the video includes (R. 117).

The Court of Appeals misapplied the standard of review, misconstrued a directed verdict motion as a motion to dismiss, neglected to properly analyze all of the factors in Williams, as well as misinterpreted §56-5-2953. Therefore this petition for rehearing should be granted.

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[2] The State intends to file a motion to supplement the record pursuant to Rule 212(b) SCACR with the full unredacted dashcam video.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant this petition for rehearing, find that the trial court did not err in admitting statements made by Appellant on a dash camera recording, that the State did comply with the DUI statute, and therefore affirm Appellant's convictions.

Respectfully submitted,

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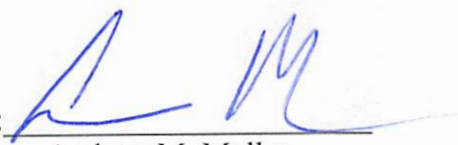
BY: 
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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the State's Petition for Rehearing on Taylor Gilliam, Esquire, counsel of record for the Appellant, by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.

This 21st day of April, 2022.

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From: Caroline Collins
Sent: Thursday, April 21, 2022 3:33 PM
To: 'Gilliam, Taylor'
Cc: Ambree Muller; William Blitch; 'Warren, Kaylynn'
Subject: The State v. Phillip Wayne Lowery (2018-002242)
Attachments: Lowery Phillip - 2018-002242 - Petition For Rehearing (02960853xD2C78).PDF

Good Afternoon Mr. Gilliam,

Attached please find the State's Petition for Rehearing in The State v. Phillip Wayne Lowery (2018-002242). This petition will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt.

Thank you!

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