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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable Robin B. Stilwell., Circuit Court Judge

State of South Carolina,

Petitioner,

vs.

Phillip Wayne Lowery,

Respondent.

Opinion No. 5983 (S.C. Ct. App. Filed April 6, 2022)

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was filed in the South Carolina Court of Appeals on April 21, 2022. The Petition for Rehearing was denied by Order filed May 18, 2022.

STATEMENT OF ISSUES ON CERTIORARI

I.

Whether the Court of Appeals erred in holding that the trial court abused its discretion in admitting statements made by Lowery on the dash cam video.

II.

Whether the Court of Appeals erred in holding that the State failed to comply with the DUI statute.

STATEMENT OF THE CASE

Procedural History

A Greenville County Grand Jury indicted Respondent, Phillip Wayne Lowery (Lowery) for driving under the influence. On December 12-13, 2018, a jury trial was held in the Greenville County Court of General Sessions with the Honorable Robin B. Stilwell presiding. Lowery was represented by J. Max Gravlee, Esquire. Petitioner (the State) was represented by Assistant Solicitor Brann Fowler of the Thirteenth Circuit Solicitor's Office. The jury found Lowery guilty as charged and the trial judge sentenced him to two years' incarceration.

On appeal, Lowery claimed the trial court erred in admitting Lowery's statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily, where law enforcement would not let him use the restroom and admitted he was not free to leave (App. 162, 164) Lowery also claimed that the trial court erred in failing to dismiss his charge, where the dash cam 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 Lowery his Miranda rights. The Court of Appeals issued a published opinion reversing and remanding Lowery's conviction for driving under the influence finding the trial court abused its discretion in admitting statements Lowery made on a dash camera recording and the State failed to comply with the DUI statute regarding a second dash camera recording. (App. 159, 171, State v. Lowery, Op. No. 5903 (filed April 6, 2022) (Howard Adv. Sh. No. 12 at 72)). Thereafter the State filed a petition for rehearing with the Court of Appeals on April 21, 2022. (App. 210) The petition for rehearing was denied on May 18, 2022. (App. 238) This Petition for a Writ of Certiorari now follows on behalf of the State.

Factual Background

Prior to trial, a Jackson v. Denno¹ hearing was held for the State's two testifying witnesses; Troopers David Vallin and Brandon McNeely each with the South Carolina Department of Public Safety. Trooper Vallin testified that that on the night of Lowery's arrest, Vallin had responded to a call about a car accident.² A short distance from the accident, officers located a vehicle with front-end damage at a Spinx gas station. Trooper Vallin arrived at the location after a few other officers. There, they found Lowery outside of the vehicle in question. Trooper Vallin turned on his dashboard camera, approached Lowery, and asked him what happened. At that point, Trooper Vallin's sole objective was to determine whether Lowery and/or the vehicle were involved in the accident and who was at fault in said accident and even stated such. (App. 12). As Trooper Vallin began speaking with him, Lowery quickly made several incriminating statements. He claimed "Well I pulled in here so someone could help me change my tire. I did not know I hit nobody," (State's Exhibit 1). This statement was made 26 seconds into the conversation between Trooper Vallin and Lowery. Lowery was not in handcuffs at the time and only Trooper Vallin was asking him questions.

Trial counsel objected to the admission, claiming that pursuant to Jackson v. Denno, arguing that Lowery's statements were made during a custodial interrogation and, because Lowery was not given Miranda warnings, they were inadmissible. Trial counsel further argued that because Lowery was formally placed under arrest later, it was "clear" he was under arrest at that time. Trial counsel also claimed that Vallin's testimony on cross examination that Lowery

¹ Jackson v. Denno, 378 U.S. 368 (1964).

² The original incident was a hit-and-run. Lowery's involvement in that incident was not the subject of his trial, therefore the trial judge limited reference to that incident as an accident. (App. 11-12)

was not free to leave the scene, further supported his position. The State disagreed, and pointed to State v. Morgan, where this court found Miranda warnings were not required when officers questioned persons during a “routine investigation” of a traffic accident. State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984). The State noted Vallin asked basic questions of Lowery in an effort to ascertain who or what caused the initial traffic accident, during which Lowery volunteered his inculpatory statements. (App. 21-25).

The trial judge ultimately concluded that Vallin’s recording, and Lowery’s statements within, were generally admissible. Based on his review of the testimony and the recording, the trial judge found Lowery was not in custody at the time he was questioned and volunteered his incriminating statements. The trial judge further found that Vallin’s questions were “fairly innocuous” and focused on the traffic accident, pursuant to a routine investigation. Thus Vallin’s actions fell within those “contemplated in the [Morgan] case.” (App. 25-26).

However, after hearing trial counsel’s concerns regarding the characterization of the car accident within the first dash cam recording, the trial judge instructed the parties to redact the portions of the recordings which unnecessarily discussed the earlier traffic incident. (App. 50-52). The trial judge made it clear that he wanted the parties to discuss any and all issues with the video recordings and other evidence in the case, including the separate recording of Lowery’s sobriety tests, and send an email before the trial began in earnest the following day. (App. 26-35, 50-53). The following day, the trial began. Neither party had any objections when the State began presenting its evidence. (App. 54)

Trooper McNeely performed the sobriety tests which were recorded on his dashcam. (State’s Exhibit 2). During the first procedure, the horizontal nystagmus test, Lowery was unable to focus his eyes on McNeely’s finger and follow it through a range of motions. When Lowery

participated in the second exercise, the walk and turn test, he struggled to walk in a line and to follow McNeely's oral commands. The third and final test, the one legged stand, required Lowery to stand on the leg of his choosing and maintain balance for thirty seconds while verbally counting the time. Again, like with the first two tests, Lowery struggled greatly in attempting the task. The results of these three tests, combined with Lowery's drunken demeanor, alcoholic odor, and urination on himself became the basis upon which McNeely arrested him. Through McNeely's testimony, the State admitted the dashboard camera recording of the tests he performed on Lowery along with the conversation between the two men. (State's Exhibit 2). When the trial court, sua sponte, asked trial counsel whether he had any objections to this recording, trial counsel had no objection provided the agreed redactions were performed on it. (App. 98).

The video was admitted and was played so that McNeely could explain each test that Lowery was performing. The first test and some of the second test were shown during trial, but the video then malfunctioned and the remainder of the video was not able to play. The State requested an off the record conference. (App. 71-74). When the parties returned, the trial judge announced the State was having technical difficulties with playing the remainder of the video. However, McNeely confirmed that the video did record and showed him providing Lowery with his Miranda warnings. Trial counsel did not lodge any objection to playing the recording despite the State's inability to display the portion showing the Miranda warnings. (App. 77).

After the State rested its case, trial counsel moved for a directed verdict of not guilty claiming the State failed to provide evidence, other than Lowery's own self-incriminating statements about driving the car, that the car had been driven by Lowery that night; none of the officers saw Lowery driving the car and no one checked to see whether "the car was warm."

(App. 86-88). The State responded that Lowery himself admitted to driving the vehicle, which was more than enough evidence to support a denial of the motion. The trial judge agreed with the State and denied the motion. (App. 91). Again, no objection relating to the admission of McNeely's recording was made by trial counsel. (App. 82-91).

After the defense presented its case, trial counsel again moved for a directed verdict. (App. 120). This time, however, the basis for Lowery's motion was the failure to play the portion of McNeely's recording which showed him issuing the Miranda warnings. Trial counsel claimed he did not previously object 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. Trial counsel maintained the DUI statute required that the issuance of Miranda warnings be recorded and such recording needs to be shown to the trier of fact. (App. 119-120)

In response, the State noted that the recording issue was addressed at bar, on the record, just shortly before. The State noted that it, along with trial counsel, redacted that video together the night before to ensure the parties complied with the trial judge's pretrial rulings and Appellant knew the Miranda warnings were contained in the recording. The trial judge denied the motion, noting the State "substantially complied" with the requirements of the recording statute. (App. 120-121)

ARGUMENT

The Court of Appeals reversed and remanded Lowery's conviction for driving under the influence finding the trial court abused its discretion in admitting statements Lowery made on a dash camera recording and the State failed to comply with the DUI statute regarding a second dash camera recording. The State respectfully disagrees with the conclusion of the Court of Appeals and asks this Court to grant the State's Petition for a Writ of Certiorari for two reasons: (1) The trial judge did not abuse his discretion in admitting statements made by Lowery in the dash cam video and (2) the trial court did not err in finding that the State complied with the DUI statute.

I. The Court of Appeals erred in holding that the trial court abused its discretion in admitting statements made by Lowery on the dash cam video.

The Court of Appeals misapprehended the relevant standard of review regarding whether Lowery was in custody and the need for Miranda at the time he gave the relevant statements. Additionally, the Court of Appeals overlooked relevant facts supporting the trial court's determination that Lowery was not in custody at the time the statement at issue was given.

While the Court of Appeals did acknowledge the basic standard of review, the Court's opinion completely disregarded the standard of review and failed 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 Lowery was not in custody. As a result, the Court of Appeals 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 the Court of Appeals 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.”).

The Court of Appeals relied on the thirteen factors set forth in Williams to determine whether an interrogation was “custodial” yet failed to address eight of the thirteen factors and failed 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, the Court of Appeals 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) (App. 207). The Court neglected to address the fact that Lowery voluntarily pulled in to the gas station, Officer Vallin did not conduct a traffic stop of Lowery, he merely arrived at the same gas station as Lowery. Significantly, Lowery 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 Lowery 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 of Appeals stated “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) (App. 207). On the contrary, Lowery was not being questioned as a suspect for DUI, he was being questioned in connection with a car accident. Under the Court of Appeals’ analysis, anytime an accident is being investigated, Miranda warnings would be required prior to discussing an 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 Lowery was not in custody.

The third factor under Williams is where the interview took place. Although the Court of Appeals did 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 Lowery 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 the Court of Appeals did not address in its analysis. Not only did they not address it, but they completely ignored 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 Lowery 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. The Court of Appeals did not address this factor, but the State

acknowledged Lowery 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, the Court of Appeals completely misstated the facts. The Court stated Lowery 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 Lowery 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. The Court of Appeals 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 a statement is made. Further, the Court of Appeals failed to address that Lowery 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 Lowery was not in custody.

The seventh factor is the length of the interrogation. The Court did not address this factor in its analysis and likely because it clearly favors the judge's ruling as the entire period 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 Lowery was not in custody.

The eighth factor is the number of officers participating. The Court of Appeals embellishes its analysis of this factor and states "he was surrounded by numerous officers" yet failed 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 Lowery 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 Lowery was not in custody.

The ninth factor is whether law enforcement dominated and controlled the course of the interrogation. The Court of Appeals 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 Lowery were having a conversation. Vallin was not peppering Lowery with questions. Some of Lowery's statements were made without being prompted by a question. This is evidence supporting the trial judge's ruling that Lowery 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, the Court of Appeals adopted trial counsel's language in stating that "Vallin admitted his interrogation was accusatory." State v. Lowery, Opinion No. 5903 (filed April 6, 2022) (Howard Adv. Sh. No. 12 at 79) (App. 207).

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 Lowery until Vallin testified at the Jackson v. Denno hearing. See Barksdale 433 S.C. 324, 857 S.E.2d 557 (Ct. App. 2021). This is evidence supporting the trial judge’s ruling that Lowery was not in custody.

The eleventh factor is whether the police were aggressive, confrontational, or accusatory. The Court of Appeals somewhat addressed 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 Lowery was not in custody.

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

The thirteenth factor is whether the person was arrested at the end of the interrogation. Again this factor was not addressed in the Court’s analysis. Lowery 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 Lowery was not in custody.

The Court of Appeals stated it looked at the totality of the circumstances through these thirteen factors, however they completely neglected to address eight of the thirteen factors. The Court of Appeals overstepped its power by disregarding the standard of review as it is not their job

to completely reevaluate the facts to determine whether Lowery 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 Lowery not being in custody. Twelve of the thirteen factors have clear evidence supporting the trial judge's ruling. Therefore, this court should find the trial judge did not abuse his discretion in admitting statements from the dash cam video, and find in accordance with the proper standard of review, that evidence existed to support the trial court's determination.

II. The Court of Appeals erred in holding that the State did not comply with the DUI Statute

On appeal, Lowery argued that the trial judge erred by denying Lowery'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. (App. 120). 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 that supported all of the required elements of DUI and Lowery did not allege that the State failed to establish any of the elements. As a result, this Court should find the trial court did not err in denying the motion for a directed verdict.

First, the Court of Appeals ruled that a dismissal was not required, but for the wrong reason. The Court of Appeals relied on the reasoning in State v. Taylor³ that the remedy for the failure to meet a statutory requirement is not dismissal, however a dismissal isn't required here because trial

³ State v. Taylor, 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014).

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, the Court of Appeals attempted to add a requirement to the procedural prerequisite for the State that is nowhere in the statute. The Court of Appeals ruled that the second, redacted dash cam video played at trial failed to comply with the DUI statute. The statute governing the video recording of a DUI offense, section 56-5-2953(A) 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). Nowhere in the statute is there a requirement that the video must be shown to the trier of fact. The Court of Appeals quoted 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 (Ct. App. 2019). "The purpose" of the video was not to show to the trier of fact, but to provide the defendant with what evidence the State had 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. The Court of Appeals' opinion

seems to put a requirement on how the State prosecutes its case and presents its evidence and that 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, the Court of Appeals overstepped 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 the Court of Appeals indicated.

Third, the full video produced by the arresting officer does comply with the statute. There is a video that was turned over to Lowery which showed all of the field sobriety tests as well as Lowery 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.⁴ 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 was 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

⁴ The State filed a motion to supplement the record pursuant to Rule 212(b) SCACR with the full unredacted dashcam video that was denied by the Court of Appeals on May 18, 2022.

run and the damage to the vehicle. (App. 50-52) Later, trial counsel claims “I don’t know what is on that video and what can and can’t be played” (App. 120). Trial counsel then made his directed verdict motion for failure to meet the requirements under the DUI law. (App 120). The State responded by stating that the State and trial counsel made the redactions together and both know what the video includes. (App. 120). Further when the video was admitted through McNeely, trial counsel stated he had no objection subject to the agreed redactions. (App. 98)

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.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests this Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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