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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF SUMTER,) Indictment # 10-GS-43-0893

State of South Carolina)

Plaintiff,)

Vs.)

ORDER

Richard Gregory Blake, Jr.,)

Defendant.)

_____)

CERTIFIED COPY OF ORIGINAL
James C. Howle
CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

This matter is before the Court on the timely Motion of the Defendant, Richard Gregory Blake, Jr. (Blake) for reconsideration of the Court's order dated November 23, 2011. In that order, the Court denied Blake's Motion to Dismiss the indictment against him for Driving Under the Influence (Third Offense). A hearing and oral arguments on the reconsideration motion were held on January 30, 2012. The State was represented by Assistant Solicitor Bronwyn McElveen and Blake was represented by Chief Public Defender Jack D. Howle.

Blake's Motion to Dismiss was based on the failure of the Sumter Police Department (Sumter) to comply with Section 56-5-2953 of the Code of Laws of South Carolina (as amended) requiring that the incident site be video recorded and that law enforcement vehicles be equipped with cameras for this purpose. He relied primarily on the recent case of *Town of Mount Pleasant v. Roberts*, 393 S.C.332, 713 S.E.2d 278 (2011).

The arresting office executed an affidavit that a video tape could not be produced because "at the time of the defendant's arrest the vehicle I was operating had not yet been equipped with a videotaping device and therefore pursuant to Section 18 of Senate bill 174 of 1998, the videotaping requirement regarding vehicles is not applicable".¹ Coincidentally, there are no video cameras in any of the Sumter police vehicles.² Blake contends that this affidavit is not sufficient under *Mount Pleasant v. Roberts* to excuse compliance. After a careful review of the evidence and the law, the Court has concluded that the Motion for reconsideration should be granted and the indictment dismissed.

The Court's earlier ruling denying the Motion to Dismiss was based on the exception recognized in *Roberts* that a law enforcement agency could establish a "valid reason" for failing to create a video of the incident site by offering documentation that, despite concerted efforts to request video cameras, it has not been supplied cameras by the Department of Public Safety (DPS). This exception enunciated in *Roberts* clearly places the burden of proof on the law enforcement agency to establish a "valid reason" for non-compliance with the statute. In my view, this burden must be show by a preponderance of the evidence. A careful review of the testimony and evidence shows that the State has failed to meet that burden.

The evidence shows that between 1998 and 2008 Sumter police made 954 arrests for DUI and that none of these were taped because there were no police

¹ The affidavit was not executed contemporaneously with the arrest on June 15, 2010. In fact, it was not executed until October 27, 2011. This is more than 16 ½ months after the arrest. 14 ½ months after Blake's Rule 5 discovery request (August 5, 2010), and 3 ½ months after the decision in *Roberts* (July 11, 2011).

² Defendant's Exhibit 2. Letter from Assistant Chief Roark to DPS.

vehicles in Sumter containing video equipment.³ The State offered **no** evidence by testimony or documentation of any attempts to obtain the cameras by applying to DPS as prescribed by law, and offered no explanation for this failure.

The current Police Chief, Russell Roark, joined the Sumter as Assistant Chief in 2009 and was promoted to Chief in September 2011 to replace retiring Chief Patty Patterson. He testified he had no knowledge concerning the application for cameras prior to his employment.

The City Manager, Deron McCormick, did not testify as to any requests made by the City of Sumter to the Department of Public Safety at any time for video cameras. In fact, his testimony was limited to a request made for a federal grant for cameras in the years 2009 and 2010. The Mayor, Joseph T. McElveen, Jr could only testify as to request made in 2009 (for FY 2010) and 2010 (for FY 2011) to the federal government for a grant to finance video cameras. These applications for federal grants came after the decision in *Rock Hill v. Suchenski* , 347 S.C. 12, 646 S.E.2d 879 (2007) which indisputably established that that the videotaping requirements of the statute are mandatory. Neither McCormick nor McElveen offered any evidence of any attempts between 1998 and 2008 to obtain federal grants or to apply to the Department of Public Safety as prescribed by statute.

Subsection (B) of Section 56-5-2953 sets forth several statutory exceptions that excuse noncompliance with the mandatory videotaping requirements. Exceptions (1), (2), and (3) are factually inapplicable. Exception (4) provides "for any other valid reason

³ This number of arrest was greater than the number for the City of Folly Beach {162 arrests}, the Town of Monk's Corner {198 arrests}, and the City of Isle of Palms {339 arrests}, all of which had received video cameras. See *Roberts*, footnote 8.

based on the totality of the circumstances". Consequently the inquiry becomes whether the evidence shows that the Sumter's failure to equip its vehicles with videotaping equipment constitute a valid reason for the failure to produce the video tape based on the totality of the circumstances.

Sumter's failure to equip its vehicles with video equipment between 1998 and 2008 is unexplained by the evidence and arouses suspicion as to its motives. As stated earlier, the burden of proof is on the State to establish a valid reason, and it has utterly failed to do so for the period 1998-2008.

The charges in this case arose with the arrest of Blake on June 15, 2010. The Court must therefore look at the evidence to determine what Sumter has done since 2008.

A letter from the Department of Public Safety dated April 28, 2009 to Chiefs/Sheriffs⁴ explained what had transpired on the statutory requirement for DPS to furnish cameras to law enforcement since the enactment of the statute and 2009 (approximately 10 years). The letter indicated that a survey was conducted in 1999 and revised in 2002 to determine what cameras were going to be needed and that all the requests had been fulfilled and over 3200 systems had been awarded. Presumably, if Sumter had asked for cameras during that period they would have been awarded.

That letter further indicated that DPS would buy and distribute VHS cameras, that they were testing digital systems, but was not ready to make any digital awards at that time.

The letter went on to say:

⁴ Defendant's Exhibit 1 produced in response to a Rule 5, SCRCrimP discovery requests.

We are requesting that you complete the attached survey as soon as possible. VHS systems will be awarded immediately, but the migration to digital will probably take place before all the requests received can be fulfilled, so please answer the questions related to digital systems. (Emphasis added).

This was clearly an attempt by the DPS to determine how many digital systems were going to be needed in the future. It also unequivocally stated that digital equipment was not available at that time but that VHS systems were available. The response of Sumter is unclear and confusing. There is no documentation that Sumter responded to the "attached survey". Two years later, in response to the ruling in *Roberts*, then Assistant Chief Roark wrote the Director of the Department of Public safety asking that Sumter be provided with cameras for 90 patrol cars. No distinction was made between VHS and digital.⁵

On July 28, 2011, the Director of Public Safety responded.⁶ He referred to the 2009 survey and stated that VHS cameras have been issued on that survey. He pointed out that Sumter Police Department "requested eight (8) digital in-car camera systems in their survey response." (Emphasis added). The letter also gave the current status for digital request.

In its original Order this Court made the statement that the distinction in the request for digital equipment as opposed to VHS equipment was a distinction without a difference and had no merit. I have concluded that that was incorrect. Sumter responded in such a way that precluded and prevented the award of available

⁵ Defendant's Exhibit 2.

⁶ Defendant's Exhibit 3.

technology, and it is clear that Sumter **made no request for equipment that was available**. One does not always get everything that is asked for. Rarely does one get what is not asked for. Based on the written documentation from DPS, had such a request been made, the VHS cameras would have been provided, or at the very least, Sumter would be in compliance with the statute by having made a proper request.

The actions of the City to obtain federal grants for cameras are commendable but not controlling. This is akin to the proverbial locking of the barn door after the horse has been stolen. Sumter has the burden of proving its compliance with the statute by applying with a meaningful and proper request to the Department of Public safety. It has failed to do so.

The motion for reconsideration is granted and the indictment is dismissed with prejudice.

Howard P. King, Judge

Sumter, SC

February ____, 2012