

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2011CP2400593

FILED
2011 AUG 1 PM 2 58
GREENWOOD

Victor Rayford Irby vs. State of South Carolina

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a),
SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy:
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- See attached order; Statement of Judgment by the Court:

Order of Dismissal

Dated at Greenwood, South Carolina, this 29th day of July, 2011.

Court Reporter:

S/ Frank R Addy Jr.
PRESIDING JUDGE - Frank R Addy Jr

This judgment was entered on the 1st day of August, 2011, and a copy mailed first class this 1st day of August, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

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Margaret Jamison Schulze Eighth Circuit Solicitor's Ofc. P.O. Box 516 Greenwood, SC 29648

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Ingram B. Moon
Ingram B. Moon - Clerk of Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)
)
VICTOR RAYFORD IRBY,)
)
Appellant,)
)
v.)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

ORDER OF DISMISSAL

C/A No. 2011-CP-24-593

2011 AUG 1 PM 2 55

OTR J. ...
GREENWOOD ...

TRIAL JUDGE: HON. FRANK R. ADDY, JR.
COURT REPORTER: JO RICE
APPELLANT'S ATTORNEY: CARSON M. HENDERSON
RESPONDENT'S ATTORNEYS: MARGARET J. SCHULZE and
ROSEMERRY FELDER-COMMANDER
DATE OF HEARING: THURSDAY, JULY 14, 2011

THIS MATTER came before the Court, sitting in Abbeville County, on Thursday, July 14, 2011, at 2:00 p.m. upon Mr. Irby's petition asking the Court to vacate and dismiss his DUI 1st conviction in Greenwood Magistrate's Court on May 25, 2011. Mr. Irby was represented by Carson M. Henderson. The State was represented by Margaret J. Schulze and Rosemerry Felder-Commander of the Eighth Circuit Solicitor's Office.

Mr. Irby was arrested for DUI 1st on June 29, 2003. At the time of his arrest, Code Section 56-5-2953 provided in relevant part as follows:

“(A) A person who violates Section 56-5-2930 . . . shall have his conduct at the incident site . . . videotaped.

- (1) The videotaping at the incident site must:
 - (a) begin not later than the activation of the officer's blue lights and conclude after

the arrest of the person for a violation of Section 56-5-2930[;] and

(b) include the person being advised of his Miranda rights, if required by state or federal law, before any field sobriety test are administered, if the tests are administered.”

Contrary to Subsection (A), the incident site videotape is missing all of Mr. Irby’s (as well as the arresting officer’s) verbal conduct until Mr. Irby was placed in the arresting officer’s patrol car after being arrested. The arresting officer administered field sobriety tests to Mr. Irby, and the arresting officer testified at trial that he read Miranda rights to Mr. Irby.

On March 18, 2011, the State produced an Affidavit for Failure to Produce Videotape dated March 17, 2011, and signed by the arresting officer. The affidavit is marked as follows: “Other valid reasons existed for failing to produce the videotape based on the totality of the circumstances. These reasons are outlined below: Videotape was produced but no sound due to faulty microphone. Issue was fixed with new microphone.”

At the time of Mr. Irby’s arrest, Code Section 56-5-2953(B) provided in relevant part as follows:

“Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal . . . if the arresting officer submits a sworn affidavit certifying that the videotape equipment at the time of arrest . . . was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment in an operable condition . . . Nothing in this section prohibits the court from considering any other valid reason for the failure to produce a videotape based upon the totality of the circumstances.”

The arresting officer produced the incident site videotape required by Subsection (A). However, the incident site videotape that was produced doesn’t meet the mandates established in



Subsection (A) for what must be seen and heard on the incident site videotape. Therefore, the arresting officer cannot use an affidavit produced pursuant to Subsection (B) to excuse the deficient incident site videotape, because an incident site videotape has in fact been produced. The pertinent issue is the State's right to use the incident site videotape that was produced.

Subsection (A) is mandatory as to what must be shown and heard on the incident site videotape. Subsection (B), when read in its totality, addresses how the Court proceeds in the absence of an incident site videotape. Subsection (B) does not purport to cure the State's failure to comply with the Subsection (A) mandates when an incident site videotape is produced. If this were not the case, Subsection (A) would have no value.

The Court notes that no South Carolina appellate decision has specifically addressed whether a Subsection (B) affidavit can be used to excuse non-compliance with Subsection (A) when an incident site videotape has been produced. However, even if our appellate courts were to hold that an affidavit can be produced pursuant to Subsection (B) when an incident site videotape has been produced pursuant to Subsection (A), in Mr. Irby's case the State has produced a deficient affidavit. Under the affidavit section entitled "Other valid reasons existed for failing to produce the videotape based on the totality of the circumstances. These reasons are outlined below;" the arresting officer's affidavit reads as follows: "Videotape was produced but no sound due to faulty microphone. Issue was fixed with new microphone."

The arresting officer didn't mark the affidavit section which reads: "At the time of the defendant's arrest or probable cause determination, the video equipment in the vehicle I was operating was in an inoperable condition and reasonable efforts had been made to maintain the equipment in an operable condition."



The arresting officer must use the affidavit section which specifically applies when attempting to justify non-compliance with Subsection (A). In this case, the arresting officer marked the wrong affidavit section. By his sworn admission, the arresting officer acknowledges the video equipment “was in an inoperable condition.” The State provided no evidence to Mr. Irby in discovery indicating that “reasonable efforts had been made to maintain the equipment in an operable condition.” Furthermore, the Court finds that the totality of the circumstances exception can only apply and be used when the other specific exceptions in Subsection (B) don’t apply.

In City of Rock Hill v. Suchenski, 646 S.E.2d 879, 881 (S.C. 2007), our Supreme Court held that “dismissal of [a DUI] charge is an appropriate remedy provided by § 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions.”

Because an affidavit can’t be used to excuse non-compliance with Subsection (A) when an incident site videotape has been produced, Suchenski mandates that Mr. Irby’s DUI 1st conviction be vacated and the charge dismissed with prejudice.

Furthermore, if an affidavit can be used to excuse non-compliance with Subsection (A) when an incident site videotape has been produced, Suchenski still mandates that Mr. Irby’s DUI 1st conviction be vacated and the charge dismissed with prejudice. The arresting officer marked the wrong exception on the affidavit, and the State failed to produce the required discovery indicating that the arresting officer’s videotaping equipment had been maintained properly or otherwise routinely inspected to ensure its operability.

Although Code Section 56-5-2953 and Suchenski do not require a defendant to show prejudice in order for a case to be dismissed for a videotaping violation, the Court finds that Mr.

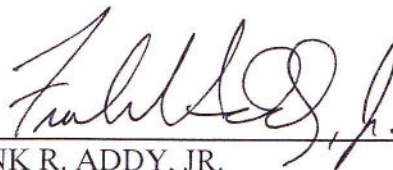


Irby was prejudiced because of the lack of audio on the incident site videotape. A defendant's verbal responses are often as important in the defense of a DUI case as the defendant's physical actions. The lack of audio prevented Mr. Irby from presenting potentially exculpatory evidence and presenting a full and complete defense as contemplated by Code Section 56-5-2953.

IT IS THEREFORE ORDERED that Mr. Irby's DUI 1st conviction is hereby vacated and the charge dismissed with prejudice pursuant to Code Section 56-5-2953 and Suchenski.

IT IS FURTHER ORDERED that the Court doesn't need to address the merits of the other grounds for appeal set forth by Mr. Irby.

IT IS SO ORDERED.



FRANK R. ADDY, JR.
Presiding Circuit Court Judge
Eighth Judicial Circuit

Greenwood, South Carolina

July 27, 2011

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