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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh, Judge

Unpublished Opinion No. 2022-UP-209
(Rehearing Denied July 28, 2022)
Court of Appeals Case No. 2019-001502

State of South Carolina,

Respondent,

v.

Dustin Lee Hooper,

Petitioner.

APPELLATE CASE NO. 2022-001204

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Respectfully submitted by:

s/Donald L. Smith
Donald L. Smith (SC Bar#6699**)**
122 N. Main Street
Anderson, SC 29621 Telephone:
(864) 642-9284 Facsimile:
(864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Petitioner

Anderson, South Carolina
October 5, 2022.

INDEX TO APPENDIX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Dustin Lee Hooper, Appellant.

Appellate Case No. 2019-001502

Appeal From Anderson County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2022-UP-209
Submitted March 1, 2022 – Filed May 18, 2022

APPEAL DISMISSED

Donald Loren Smith, of Attorney Office of Donald Smith, of Anderson, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

PER CURIAM: Dustin Lee Hooper appeals his conviction and sentence for driving under the influence (DUI), arguing the trial court should have dismissed his case because the applicable DUI statute was not complied with. Because a Rule 60(b)(1), SCRCP, motion does not toll the time for serving an appeal, we find

Hooper's appeal is untimely and dismiss the appeal. *See* Rule 29(a), SCRCrimP ("[P]ost-trial motions shall be made within ten (10) days after the imposition of the sentence. . . . The time for appeal for all parties shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion."); Rule 203(b)(2), SCACR ("After a . . . trial resulting in conviction . . . , a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed."); *Coward Hund Constr. Co. v. Ball Corp.*, 336 S.C. 1, 5, 518 S.E.2d 56, 59 (Ct. App. 1999) (noting that a Rule 60 motion "d[oes] not toll the time for the filing and service of [a] notice of appeal"); *Camp v. Camp*, 386 S.C. 571, 574-75, 689 S.E.2d 634, 636 (2010) ("Service of the notice of appeal is a 'jurisdictional requirement, and [the appellate c]ourt has no authority to extend or expand the time in which the notice of intent to appeal must be served.'" (quoting *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985))).

APPEAL DISMISSED.[1]

THOMAS, MCDONALD, and HEWITT, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh Judge

C.A. Nos.: 2017-GS-04-0365
Appellate Case no. 2019-001502

State of South Carolina, Respondent,

v.

Dustin Lee Hooper, Appellant.

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

Appellant Dustin Hooper, through his undersigned counsel, respectfully submits this Petition for Rehearing and Suggestion for Rehearing En Banc regarding the Order dismissing his appeal, filed on May 18, 2022.

INTRODUCTION

This Petition relates to the timeliness of Appellant's second post-trial motion. It also concerns the Trial Court ignoring a statute, as well as the case law which serves as the precedent for the statute's application. Petitioner moves this Court for the opportunity to supplement the Amended Record on Appeal by submitting a Certificate of Service for the Motion for Relief from Judgment which was created for his second post-trial motion. Counsel for Respondent, William M. Blitch, Jr., Assistant Attorney General, has no objection to the addition. Appellant

contends the Certificate of Service removes any question of the timeliness of his second post-trial motion.

Appellant filed a Motion for Relief of Judgment on August 5, 2019, by placing it in the U.S. Mail. On August 8th the undersigned was directed to change the name of the document. The document name was changed to Motion to Vacate by way of a Motion to Amend on August 9th. The Trial Court did not find the second post-trial motion failed for timeliness. The State did not address timeliness until the Appellate level.

The State pursued its prosecution of the case using State vs. Landis, 362S.C. 97, 606 S.E.2d 503 (2004) as its basis for the affirmation of the Trial Court's ruling. The State believes the facts found herein are nearly identical to *Landis* and the holding in it should control. Appellant considers Town of Mt. Pleasant v. Roberts, 393 S.C. 332 (2011) is in tune with legislature, which should have been the focus of the Trial Court rather than ignoring precedent and making an erroneous finding.

Appellant submits that the trial court erred in proceeding with the trial because the Anderson County Sheriff's Office chose to have a car used for traffic control operated without a video camera required by statute since 1998. The Court simply refused to abide by the seminal case involving a jurisdiction failing to act according to the law. In fact, the Court offered the following comment from *Mt. Pleasant*, "Y'all had plenty of time to get cameras." (Amended Record, p. 99, 10). The *Mt. Pleasant* decision was rendered eight (8) years before the Trial Court ignored the fact 8 years had been added onto "plenty of time to get cameras".

PROCEDURAL BACKGROUND

The parties in this case went to trial on March 6, 2019, for a DUI charge against herein Appellant. The jury found the Appellant guilty. On March 8, 2019, the trial court issued an

Order indicating it was deferring sentencing until after an appeal has concluded. Pursuant to Rule 29 of South Carolina Rules on Criminal Procedure (SCRCrimP), Appellant moved to reconsider. On July 25, 2019, the trial court denied the motion and at the same entered sentence for the Appellant. Any post-trial motions were required to be filed within ten (10) days. The tenth day would have been on Sunday August 4th. Therefore, filing and service would be necessary by Monday August 5th.

Appellant filed a Motion for Relief of Judgment via U.S. Mail on August 5, 2019; and served a copy of same by mail to the Court and the Respondent. In his motion, Appellant prayed for the Trial Court to vacate the judgment based on inadvertence. Appellant averred the Trial Court failed to rule on the issues of absence of video and failure by Respondent to provide an affidavit to address an exception available to it. Appellant learned his August 5th filing of a Motion for Relief of Judgment was deemed not acceptable as titled. Thus, he re-filed the motion as a Motion to Vacate Judgment, while also filing a Motion to Amend to provide the opportunity to file it. Appellant asserted the contents of the motion as well as the prayer for relief did not change with the title. Assuming the filing was timely, the title of the filing should not control the message of same.

On August 27, 2019, the trial judge summarily dismissed the Motion to Amend, Motion to Vacate and Motion for Relief of Judgment. Despite the dismissal, the Court heard the same on August 29, 2019, where the court issued a second Order denying Appellant's Motion to Vacate Judgment. Appellant perfected his Notice of Appeal on August 30, 2019.

Pursuant to Rule 208 of the South Carolina Appellate Rules of Court (SCACR), Appellant filed his Initial Brief of the Appellant and Designation of Matter to be Included on Record on Appeal on December 23, 2019. Respondent moved for an extension to file its Initial

Brief, which was granted by the Court. On January 22, 2020, Respondent filed a Motion to Dismiss challenging the timeliness of the appeal. The Appellant filed his return in a timely manner.

ARGUMENT

THE APPEAL WAS PERFECTED PURSUANT TO RULE 203(b)(2) OF THE SOUTH CAROLINA APPELLATE RULES

In its Motion to Dismiss, Respondent contends that Appellant filed his Notice of Appeal outside of the reglementary period. Respondent raised two issues in its motion: (1) that Appellant should have filed his Notice of Appeal on August 5, 2019, after the denial of the Motion for Reconsideration; and (2) that even assuming that the subsequent motion(s) was proper the same was filed outside of time. Appellant believes otherwise.

A. A successive post-trial motion was necessary for issue preservation.

Respondent asserts that the trial court did not have jurisdiction to consider Appellant's Motion to Vacate Judgment, citing the case of State v. Pfeiffer, 427 S.C. 10, 828 S.E.2d 764 (2019). The Court in *Pfeiffer* stated that:

> Successive Rule 29(a) motions are generally not permitted. However, where a second Rule 29(a) motion is related to the disposition of the first Rule 29(a) motion, the trial court retains authority to hear and dispose of the subsequent motion, provided the subsequent motion is filed within ten days of the disposition of the prior post-trial motion.

Appellant had a right to file his Motion to Vacate Judgment, under Rule 29 SCRCrimP. The respondent's use of *Pfeiffer* is misplaced. In that case, the Appellant had filed a motion to correct a clerical error which the Court granted; and it corrected the error. Immediately following the modification of the original sentence Appellant's co-defendant was sentenced to

less time. Appellant filed a Motion to Reconsider for a reduction in sentencing. Since the second motion had nothing to do with the initial motion, it did not toll the time for appeal.

The above ruling in ***Pfeiffer*** does not apply in this case because the Motion to Vacate Judgment filed by Appellant was related to the prior motion. Moreover, a second post-trial motion had to be filed to preserve the errors the Trial Court purposely failed to address in his denial of relief. In *Coggeshall*, the Appellant failed to make a post-trial motion part of the record which allowed the trial court's summary denial to stand because the issue had not been preserved for the appellate court to rule. Coggeshall v. Reach, 655 SE 2d 476 - SC: Supreme Court 2007.

B. The filing of the second post-trial motion was timely.

The Trial Court in this matter simply denied requests that he follow the law. This case is exactly the same as *Mt. Pleasant.* As in the former case, Anderson County Sheriff's Office had a vehicle sans a video camera monitoring traffic. The Trial Court attempted to shift the burden of explaining the lack of a camera on the Appellant. "There's no evidence in the record to suggest this car had been out for a long period of time." (Amended Record, p. 112, 7.9).

The State had the obligation of explaining why the vehicle was not fitted with a camera. They did not even pretend to have an explanation. Moreover, there was evidence in the record that Officer Coons, the first officer, drove the car assigned to him. He explained he is part-time; and he uses it on Wednesdays and the Saturdays he doesn't have his children. (Id., p. 51.52, 25.11). He said without qualification, "The car is not equipped with video." (Id., p. 50, 17). He did not say it was out getting worked done or it would soon be installed. His testimony was his car was still not equipped with a camera- two and a half years after he stopped the Appellant.

The Court's conclusory statement that the trooper was the arresting officer is void of reason, like the rest of his "analysis" in this case. In *Landis*, Trooper Davis witnessed Landis

driving erratically. Before he could reach Landis, a member of the State transport police was in the proximity and pulled him to the side of the road. Davis arrived simultaneously with the transport officer. He did all of field sobriety tests and arrested Landis. Davis's camera was inoperable. Davis created the necessary affidavit relating to the failure to video; and the conviction was affirmed.

Officer Coon had been with the ACSO since 2014 at the time of the trial in this case. He had a Crown Vic assigned to him for a vehicle. At the 2019 trial, his car remained unequipped with a video camera. That is why the Court made Trooper Davis the arresting officer. The Court recognized if he allowed Coon to be the arresting officer, his reversal would be inevitable.

The Court's assessment finding Coon was not the arresting officer was as void of substantiating comment as the rest of the decisions made in the lower court. In the second post-trial motion hearing held on August 29, 2019, the Court discussed the county's lack of a camera in Coon's car at length. From that topic, he ruled without discussion.

> And so, under the case that you cite, *Landis*, the second person who was the arresting officer under the statute did have a video; so, therefore, requirements of the statute are met. (Amended Record, p. 123, 15.18.).

Coon was the arresting officer. He found the car which was the subject of a BOLO. He turned on his blue lights which should have initiated the absent camera. He testified to the following observations:

> A. At that point, we proceeded through the traffic light. I noticed the vehicle tried to ease over to the right-hand lane, and I initiated my blue lights. Watched the vehicle make several attempts to the right-hand side of the road as it was trying to get off the roadway, and then took an immediate right turn onto Walker Drive. Rested about 200 yards down onto a service center parking lot.

(AR, p. 47, 3.10).

13 A. The attempt to turn, to me where the vehicle
14 was trying to exit the roadway using no turn signal,
15 but there's several turnoffs right there.

(Ibid., 13.15).

16 A. Upon me asking for his driver's license, he
17 made several attempts to look in his wallet. He
18 never produced his driver's license, and he tried to
19 hand me what appeared to be a debit card.

(Ibid., p. 48, 16.19).

2 A. Mr. Hooper was very dazed, speech was slurred,
3 and very disoriented.

(Ibid., p. 49, 2.3).

14 Once I made contact with the vehicle and
15 understood that it was probably suspicion of driving
16 under the influence, I gave a motion and the highway
17 patrolman came over and took control of the scene at
18 that point.

(Ibid., p. 49, 14.18).

Coon initiated the blue lights because of the BOLO. He "observed" all of the above-referenced "textbook" traits of an impaired driver. In an effort to somehow diminish his DUI observations, he said, ***probably suspicion of driving under the influence.*** There is absolutely no question Dustin Hooper was arrested at that time.

Landis also cited the case of *State v. Garvin* in determining the arresting officer.

> The term "arrest" has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made. It is intended to serve, and does serve, the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in, or contemplated by the process.

State v. Garvin, 341 S.C. 122, 55 S.E.2d 591 (Ct. App. 2000) as cited in *Landis*. According to Coon's testimony, Appellant was drunk, high, disoriented, slurring his speech, etc. He was the one who stopped Appellant. He was the one made the above-referenced observations which illustrated Appellant needed to be "restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made."

Officer Coon was the man who pulled Appellant over for in part his erratic driving. Officer Coon was an officer of the law armed with lawful process which he utilized. ***Officer Coon was required to arrest Appellant.***

In South Carolina, in order to be found guilty of DUI the individual charged ***must*** have his conduct video recorded by the State. S.C. Code Ann. §56-5-2953(A). More importantly, "the video ***must*** not begin later than the activation of the officer's blue lights". According to Merriam-Webster the word must means "to be required by law". The State did not video from the initiation of the blue lights as required by the law. Not only that, but there was also never any testimony or evidence which allowed for circumvention of the statute. Then again, what was Coon's affidavit going to say? I arrested a man for driving under the influence, but I handed him off to the State Police because I didn't have, nor have I ever had, a camera?

Appellant's post-trial motions were filed in response to the trial judge's failure to specifically rule on the issues of the absence of video and failure by Respondent to provide a sworn affidavit as an exception to the DUI Videotaping Law. These issues were raised by Appellant in his Motion for Reconsideration. The judge's failure to provide a reason as to why he believed he could disregard the true meaning of the statute and ignore the precedent set with the issuance of *Mt. Pleasant,* needed to be preserved for this Court to review. It is imperative

that the Appellate Court has the opportunity to address such an egregious failure to apply the law and the precedent of the application found in *Mt. Pleasant.*

The summary dismissal of Appellant's issues in his Motion for Reconsideration, is a valid ground for a motion to vacate. The Motion to Vacate was filed due to someone's dislike for Motion for Relief of Judgment which was originally filed. Thankfully, not having the exact name of the legal doctrine used in arguing the preserved issues is not fatal-as long as the arguments being made regarding the issues are clearly related to those being raised. State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010).

The subsequent motions were timely filed.

Respondent contends that the Motion for Relief of Judgment and Motion to Amend and Motion to Vacate were not timely filed. Respondent claimed that since the Motion for Relief of Judgment was clocked on August 8, 2019. The motion was mailed to the court and Respondent on August 5, 2013. Absent a provision prohibiting filing and serving motions in criminal cases by mail, Appellant believes that filing and service by mail is complete upon mailing. Appellant prays the Certificate of Service which memorialized the mailing of the documentation will be accepted given the fact the State has graciously withheld any objection to same.

Furthermore, Respondent did not raise the issue of timeliness in its Response to Defendant's Motion for Relief of Judgment Pursuant to Rule 60(b)(1). (Exhibit 1). Neither did it register its objection during the hearing of the motions on August 29, 2019. Objections not raised in the trial court cannot be relied on in the appellate court. Wilson v. Clary, 212 S.C. 250, 47 S.E.2d 618 (1948) as cited in Doe v. SBM, 327 S.C. 352 (1997). "As a general rule, an issue may not be raised for the first time on appeal but must have been raised to the trial judge to be preserved for appellate review. Issues not raised in the trial court will not be considered on

appeal." Anonymous v. State Board of Medical Examiners, 323 S.C. 360, 473 S.E.2d 870, 879 (Ct. App. 1996).

The Notice of Appeal was timely filed.

Rule 29(a) of the SCRCrimP provides that the time for appeal for all parties shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion. The trial court issued an Order denying Appellant's Motion to Vacate on August 29, 2019. Appellant served and filed his Notice of Appeal on August 30, 2019, within the time limit.

CONCLUSION

The Trial Court in this matter decided for whatever reason he was simply not going to adhere to the law. Despite the clear language of the statute, he went around the end by offering one sentence about who the arresting officer was in October of 2016. He didn't apply the facts of this case to *Landis* because he would have recognized his error. Counsel for Respondent summed it up nicely. While Mt. Pleasant was using the lack of funds to excuse their illegal conduct, ACSO was simply handing the case off to another agency to do the investigation due to the understanding their prosecution would fail. (AR, p. 123, 3.6).

s/Donald L. Smith
Donald L. Smith (SC Bar #: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attomeydonaldsmith@gmail.com
Attorney for Appellant

Anderson, SC
May 31, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Dustin Lee Hooper, Appellant.

Appellate Case No. 2019-001502

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Donald Loren Smith, Esquire
Alan McCrory Wilson, Esquire
William M. Blitch, Jr., Esquire
The Honorable R. Lawton McIntosh

FILED
Jul 28 2022

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ANDERSON COUNTY Court of General Sessions

R. Lawton McIntosh Judge

C.A. Nos.: 2017-GS-04-0365
Appellate Case No. 2019-001502

State of South Carolina, Respondent,

v.

Dustin Lee Hooper, Appellant.

FINAL BRIEF OF APPELLANT

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s/Donald L. Smith
Donald L. Smith (Bar No. 6699)
122 N. Main Street
Anderson, SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

Anderson, South Carolina
October 15, 2020

Other Counsel of Record:

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
Post Office Box 1 1 549
Columbia, SC 2921 1
(803) 734-3727

DAVID R. WAGNER
Solicitor, Tenth Judicial Circuit
PO Box 8002,
Anderson, SC 29691
(864) 260-4046

Attorneys for Respondent

STATEMENT OF ISSUES ON APPEAL

WHETHER THE TRIAL COURT ERRED IN APPLYING THE DOCTRINE LAID DOWN IN THE STATE v. LANDIS TO THE INSTANT ACTION.

STATEMENT OF THE CASE

On October 28, 2016, Appellant Dustin Hooper (hereinafter referred as Hooper) started his day at 7 a.m. He worked a double shift at the Twisted Flame and got out around 10:30 p.m. He went home to shower; and, then head to TL Hanna to help jumpstart his friend DJ's car at around 11:00 p.m. After managing to get through the post-game, Westside traffic, he and DJ went to Christopher Steven Cauley's house off Highway 24. They were there momentarily; and, then proceeded to Clemson where they had learned of Halloween festivities. They got to the Pier around 12:30 a.m.

DJ knew people at the Pier and pushed through the crowd to join other friends. Hooper and Steven sat on the front hood of the car and watched the traffic of party goers going in and out of the Pier. The crowd, which were enjoying the festivities for several hours, was not something that either Hooper or Steven wished to contend. After approximately thirty (30) minutes, they left for a bonfire of which they had become aware.

Hooper drove them to the bonfire, which was roughly ten minutes away. They got to the bonfire sometime around 1:15 a.m. As had been the case at the Pier, they were not really familiar with the attendees. They managed to hang out for another thirty to forty-five (30-45) minutes, due to the fact that it was not nearly as crowded. Around 2:00 a.m., they got a call from DJ, whose car would not start again. They got in the car and headed back to the Pier.

They returned to the Pier to find DJ at his wit's end regarding the issue of his car's inability to start. They managed to get the car started once again; and, recognized that the

evening had been a huge disappointment; and it was time to cut their respective losses. The three of them said their goodbyes and left the Pier.

Initially, Hooper was to follow Steven back to his residence off Highway 24. However, as he traveled Clemson Blvd. toward Anderson, Hooper felt the day had been long enough; and he simply wanted to go home. Therefore, rather than go to Steven's house, he stayed on Clemson Blvd. in order to have a straight path to his own home.

On October 29, 2016 at 2:32 a.m., a call was made to 911 from an unnamed citizen. The call was dispatched. The caller relayed the following:

(a) That a red sedan with a tag number JKB851 was all over the road; and,

(b) That he was following the vehicle passing the KIA dealership in Anderson.

Reserve Deputy Charlie Coon (hereinafter referred as "Coon") responded to the call and located a black car that was of a similar make-at the 28 Bypass overpass of Clemson Blvd. Coon is a reserve in the ACSO. His primary employment is at Piedmont Honda and works only when his children are not with him. Coon saw Hooper's car and recognized that may be the vehicle the caller had described. He checked the tag with dispatch; and it was a match. He immediately blue-lighted the vehicle; and, subsequently, made a traffic stop.

A few minutes later, two troopers were coming from the opposite direction and saw that Coon had engaged his blue light for what appeared to be the vehicle they were seeking. They each did a U-turn; and, upon arrival, offered assistance to Coon.

Coon's vehicle, or the one that he used once a week, was not equipped with a dash cam. He did not have a button cam on his uniform, either. Coon allowed the troopers to question Hooper.

It must be noted that when the troopers arrived, they pulled in behind Coon's

vehicle. Coon's vehicle, whose blue lights remained active, was between Hooper and the troopers' vehicles. Approximately five minutes into the stop and line of questioning, Coon moved his vehicle. Thus, for a whole five minutes, Hooper was barely seen in the video.

At that point, Hooper was subjected to the field sobriety tests. Trooper Griffin determined that Hooper failed the tests, placed him under arrest for DUI. Hooper was then transported to ACDC, where he was asked to take the breath test. Hooper refused to undergo the breath test.

In trial, Coon testified that he saw Hooper making "hard right turns" when he was attempting to make the traffic stop. On the same token, he testified that Hooper never touched the curb. There is no way that Hooper could have made such a turn without striking the curb, which Coon testified that he had not. He did not offer that Hooper had done anything while approaching the traffic light.

Coon also stated that the car assigned to him by ACSO did not have a dash cam for purposes of videotaping statute (SC Code Ann. § 56-5-2953).

On March 6, 2019, a jury convicted Hooper of DUI. He moved to remain on bond during the appellate process, which the trial court granted. Hooper moved for reconsideration, which the trial court denied on July 25, 2019. On August 5, 2019, Hooper filed a Motion for Relief from Judgment praying the trial court would vacate the judgment based on inadvertence. Hooper moved to amend the above-said motion into Motion to Vacate Judgment on August 9, 2019. On August 27, 2019, the trial court issued an Order denying the motion without the necessity of a formal hearing. Despite said Order, the trial court heard the parties' arguments on August 29, 2019. On August 30, 2019, the trial court denied Hooper's Motion to Vacate the verdict. Thus, this appeal.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only. State v. Bacchus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

ARGUMENT

THE TRIAL COURT ERRED IN APPLYING THE RULING IN STATE v. LANDIS IN THE INSTANT ACTION.

The circumstances of this case are different than those found in *State v. Landis*.

Respondent contends that since Trooper Griffin was the arresting officer and he produced a video, then his acts complied with S.C. Code Ann. §56-5-2953. Respondent cited the case of State v. Landis, 326 S.C. 97, 606 S.E. 2d 503 (S.C. Ct. Appl. 2004) as a precedent.

Hooper insists that reliance on *Landis* is misplaced. It is improper to apply the ruling in *Landis* because the circumstances are different. The pertinent facts of that case are as follows:

> On November 27, 2000, South Carolina Highway Patrol Trooper David Davis (Trooper Davis) observed a vehicle driven by Landis headed northbound on Interstate 85. Landis was weaving and straddling the center lane. A State Transport Police Officer had taken a position immediately behind Landis' vehicle. The State Transport Police Officer initiated blue lights and pulled Landis over to the side of the interstate. Trooper Davis then pulled behind the Transport Police Officer. After the Transport Officer removed Landis from his car, Trooper Davis performed the field sobriety test, determined Landis was impaired, and placed him under arrest for DUI. There was no videotape of the incident site because Trooper Davis' videotape machine was inoperable at the time of Landis' arrest.

Landis, supra.

Landis argued that the State Transport Police Officer was the arresting officer, to which the requirements of Section 56-5-2953 must be met. The circuit court ruled that Trooper Davis was the arresting officer, which was affirmed by the Court of Appeals. It ruled that "*Trooper*

Davis was the "arresting officer" as that phrase is ordinarily understood. Trooper Davis personally observed Landis driving prior to the traffic stop. He arrived at the scene simultaneously with the State Transport Officer. Trooper Davis pulled in directly behind the Transport Officer and approached just after Landis had been removed from his vehicle. Moreover, Trooper Davis conducted the field sobriety test, determined Landis was impaired, and placed him under arrest for DUI." Id.

In the instant case, Trooper Griffin did not observe Hooper's driving and was not present during the stop. Unlike the *Landis* case where Trooper Davis personally observed *Landis*' driving and arrived simultaneously with the State Transport Police Officer at the traffic stop, in the instant case, there was no opportunity for Trooper Griffin nor his companion to have personally observed Hooper's alleged violation. Trooper Griffin, with his companion, came from the opposite direction and saw Deputy Officer Coon (hereinafter referred as Coon), engaging his blue lights. The troopers made a U-turn and upon arrival at the traffic stop, they offered their assistance to Coon. Coon, aware that he did not have the requisite camera to videotape the stop and Hooper's conduct, allowed the troopers to perform the field sobriety tests (FSTS) and place the latter under arrest. Coon moved his car out of the way for Griffin. In his testimony, Coon admitted to parking behind Hooper. (R. p. 54, 14.18).

The circumstances that led the Court to decide that Trooper Griffin was the arresting officer in *Landis*, differ largely from that of the instant case. *Landis* ruling does not apply to this case.

Coon is the arresting officer.

Landis also cited the case of State v. Garvin in determining the arresting officer.

> The term "arrest" has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his

> liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made. It is intended to serve, and does serve, the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in, or contemplated by the process.

State v. Garvin, 341 S.C. 122, 55 S.E.2d 591 (Ct. App. 2000) as cited in *Landis*.

Hooper maintains that Coon was the arresting officer. He was the one who responded to the anonymous tip/call and located, followed, and observed, Hooper while the latter was driving. It was Coon who determined that there was probable cause for stopping, and himself performed the traffic stop. Coon restrained Hooper's liberty, because the whole time that they were waiting for the two troopers, Hooper could not leave the site voluntarily. Coon pulled in behind Hooper so he could not leave. Coon was the one who brought Hooper within the custody and control of the law, when he handed Hooper over to the troopers. Coon was present the entire time Hooper was performing the sobriety test, until the latter was transported to the ACDC. Coon was the arresting officer responsible for meeting the statutory requirements of Section 56-5-2953.

The State contends that Trooper Griffin was the arresting officer, by reason of him conducting the FSTS and the subsequent arrest, despite not having personal knowledge of the reason for the traffic stop. For the Court to accept this logic is to allow the State to circumvent the law and allow different officers to conduct the different phases of the DUI arrest, thereby negating accountability.

The arresting officer did not comply with § 56-5-2953.

Hooper posits that his arrest and conviction should be reversed for failure by the State to comply with the Mandatory DUI Videotape Law. S.C. Code Ann. §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 show the person being advised of his Miranda rights.

(b) A refusal to take a field sobriety test does not constitute disobeying a police command.

(2) The video recording at the breath test site must:

(a) include the entire breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test;

(b) include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test; and

(c) also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video record this waiting period.

(3) 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.

(B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn

> affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.
>
> xxx xxx xxx

S.C. Code Ann. § 56-5-2953 (A)&(B)

A. Coon did not have a video camera in his patrol car, which violates the statute demanding the same.

In his testimony, Coon admitted that he was unable to record the stop or conduct of Hooper and the FSTS, as required by §56-5-2953, because the car issued to him was not equipped with a dash cam. The Statute requiring law enforcement agencies to provide its patrol vehicles with video camera equipment, has been in effect since June 1994. (Act No. 434, Section 18). On October 29, 2016, Anderson County Sheriff's Office had not complied with this mandate.

In the case of *Town of Mt. Pleasant*, the Appellate Court found that the protracted failure to equip its patrol vehicles with video camera defeated the intent of the Legislature. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011).

In the above-mentioned case, Officer Burbage of the Town of Mt. Pleasant Police Department, effected a traffic stop of Treva Roberts. *Id.* Officer Burbage performed three (3)

field sobriety tests on Roberts, which she failed. Officer Burbage arrested Roberts for DUI, transported him to the police department and was offered a breathalyzer test. Roberts refused.

Officer Burbage failed to record the initial stop, the conduct of the defendant in the incident site and the FSTS. Officer presented an Affidavit showing that at the time he was operating the vehicle, that it was not equipped with videotaping device. The State argued that the statute requiring videotaping of the DUI did not apply to Town since the law only takes effect "once the law enforcement vehicle is equipped with a videotaping device". *Id*. The State opined that since its vehicles were not equipped with video cameras, then the above-mentioned law did not apply to it. *Id.*

The Court of Appeals noted that there were municipalities whose law enforcement agencies had not placed cameras in patrol cars long after the law was enacted. The Court of Appeals ruled that the Town should not be rewarded for continually evading their duty under the statute. *Id*. The Court of Appeals found that their behavior and lack of compliance within reasonable amount of time was sanctionable. The Court ruled that the remedy for the Town's failure to equip its patrol cars with cameras is dismissal of the charges, just as dismissal is the appropriate remedy for other violations of the mandatory provisions of § 56-5-2953:

> As evidenced by this Court's decision in Suchenski, the Legislature clearly intended for a per se dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953. Notably, the Legislature specifically provided for the dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. Id. § 56-5-2953(B) ("Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930 . . . if [certain exceptions are met]."). The term "dismissal" is significant as it explicitly designates a sanction for an agency's failure to adhere to the requirements of section 56-5-2953.

Mt. Pleasant, supra.

Hooper submits that the ruling in *Town of Mt Pleasant* should be applied in this case. ACSO had not equipped Coon's patrol car with a dash cam, despite the fact that his only purpose on the one day a week that he worked was to monitor traffic. It should be noted that the above-mentioned statute has been active for nearly eighteen (18) years, and the ruling on *Town of Mt. Pleasant*, was issued five (5) years prior to the stop herein. The county and ACSO had more than enough time to comply with the statute by equipping their patrol cars with camera/dashcams.

In denying Hooper's Motion to Vacate Judgment, the trial court judge stated:

> THE COURT: Well you know, again, there's no evidence in the record to suggest this car had been out in use for a long period of time. It should have been equipped and it wasn't. There's no evidence to suggest the other way, or that it was brand new and hadn't had it done.

(R. p. 123, 7.12).

This concern was addressed in Town of Mt. Pleasant when the Court recognized that while the statute was "silent with respect to a time requirement for when vehicles must be equipped with video cameras. However, applying the rules of statutory construction, we find the Town's interpretation would defeat the legislative intent of section 56-5-2953 and the overall DUI reform enacted in 1988." *Town of Mt. Pleasant, supra.*

Clearly, the law did not distinguish between used or newly acquired vehicles. Moreover, there was no distinction as to how long the vehicles had been absent video equipment. This Court should not condone the county and ACSO's willful and wanton disregard for legislative reform that took place over a quarter century prior to the stop; and, an appellate decision that eliminated any gray area that may have existed regarding legislative intent. The plain meaning of the language of the statutory reform put into effect over three (3) decades ago dictates that this

action be dismissed. Only then will there be compliance with the legislature's directive.

B. Arresting Officer failed to submit the mandatory affidavit.

This law must be read in two parts. The first was the mandate for arresting officer to produce the required videotape of the DUI arrest. Failure to produce the videotape would justify the dismissal of the DUI charges.

The second part of the statute, subsection (B), provides for the exception to the mandatory requirements of subsection (A). In short, failure to produce the required videotape is not alone a ground for dismissal, provided the arresting officer submits a sworn affidavit either (1) certifying that the video recording at the time of the arrest was in an inoperable condition and stating the reasonable efforts taken to maintain the equipment operable, or (2) that it was impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed.

There are numerous cases holding strict compliance with §56-5-2953 is best effectuated by way of dismissal of a DUI or DUAC charge where a violation of subsection (A) is not mitigated by subsection (B) exception (or the affidavit requirement). Murphy v. State, 392 S.C. 626, 630, 709 S.E. 2d 685, 687 (Ct. App. 2011), City of Rock Hill v. Suchenski, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007), and Town of Mt. Pleasant , supra 393 S.C. 332, 346, 713 S.E.2d 278, 285.

Hooper argues that the arresting officer's inability to produce the required video; AND, failure to provide an affidavit justifying its nonexistence as required by subsection (B) of the statute, operate to the dismiss the DUI case against him.

C. The video recording did not comply with the contents required by the law.

Section 56-5-2953 requires that a person who drives under the influence must have his conduct at the incident site videotaped. The law requires that videotaping must begin not later than the activation of the officer's blue lights. The video must include: (1) the defendant's conduct at the incident site; (2) field sobriety tests (FSTS); (3) defendant's arrest; and (4) reading/advising defendant of his Miranda rights.

In the case of *Town of Mt. Pleasant*, this Court stated that the purpose of §56-5-2953… "is to create direct evidence of a DUI arrest." *Town of Mt. Pleasant, supra.* Hooper believes that this evidence should include the stop itself. This is even more pronounced when the statute dictates that the recording begins not later than the activation of the officer's blue lights. Normally, blue lights are activated when a member of law enforcement has observed a sign and/or warning from the actions of an individual which give rise to probable cause that there has been a violation of a law or ordinance; and, as such, said driver should yield to the law enforcer's investigation. This signals the start of the DUI investigation.

Hooper argues the law intended for the stop to be recorded as well because it is the only way for defendant to be protected from embellishment of his actions by law enforcement agents attempting to ferret out drunk drivers and safeguard the public from baseless, invalid or unlawful stops. Hooper believes that this is the rationale for requiring that the recording begins not later than the activation of the officer's blue lights.

Furthermore, the law provided that the videotaping must include the defendant's "conduct at the incident site", which should include the violation.

Coon testified that he was responding to a call about a reckless driver in a sedan with tag JKB851. There was no description of the driver. Coon opined that Hooper was making "hard right turns", prior to turning onto Walker Drive, where Coon effected the stop. (Trial Transcript,

p. 15, 21.25 & p. 16, 1.11). Since a hard-right tum is a 90-degree tum, common sense indicates that this could not be the case. Hooper could not have made such a tum without striking the curb. There was no physical evidence showing damage on the right side of Hooper's vehicle, indicating an inability to safely navigate from the point of blue-light initiation until he stopped in the well-lit front of a business.

Hooper believes that without the video showing the stop, the reason for the stop could not be ascertained.

On the BOLO issue:

During the hearing for Hooper's Motion to Vacate, Respondent raised the defense that the video requirement does not apply in this case since this is not an ordinary DUI case, but a BOLO stop.

MR. OVERBY. That's quite alright. The issue is who has to produce the video. This case I would actually put more akin. And Mr. Smith, I'm just gonna amend one thing that he says or make a correction. The legislature's not saying that these officers have to have cameras for all traffic offenses. This does not apply.
THE COURT. Just the DUI case. And the statute does say that.
MR. OVERBY. Correct. But it's only for DUI cases.
THE COURT. Right.
MR. OVERBY. So when an officer is conducting a traffic stop, and in this case, the officer had a BOLO, okay, I mean, and he conducts the traffic stop. He believes that it's possible impairment. But I mean, the question becomes ultimately this, what is the officer to do? Is he supposed to allow the drunk driver to continue on the roadway without---

(R., p. 122-123).

First, there is no case law nor statute that justifies Respondent's position. The

videotaping law did not make any distinction between DUI and BOLO call.

Furthermore, no officer knows if someone is DUI until the offender is in his presence. Hooper got pulled over for erratic driving. This is the same as a normal DUI.

Second, Respondent himself applied the DUI video requirement as the standard in his arguments against Hooper. Respondent should not be allowed to cherry pick which part of the law to apply to its cause, and discard those that do not work in its favor.

Third, even assuming there was a BOLO for herein Hooper, the anonymous tip standing alone, does not constitute probable cause. The conclusory statement of the caller had no corroboration. This was especially significant as Coon admitted himself that Hooper's vehicle did not exactly matched the description in the BOLO call:

Q. Okay. And what -- what was the vehicle description under the BOLO?
A. The vehicle description came out as a red in color Honda Civic stating a South Carolina tag, JKB-851.
Q. And what was it called in by?
A. It was called in by a following citizen.
Q. Okay. And what drew your suspicions to the vehicle that night?
A. What drew my suspicions to the vehicle was, I approached 76 off of 28 Bypass on the down ramp in Anderson County. Took a left onto 76 to try to cut off the vehicle, and noticed the vehicle underneath the bypass at a stop -- at a stoplight. So I turned around on the vehicle. With the vehicle description, it was of a different color. So I called dispatch and asked them to make sure that this was the accurate tag that they had been given, and it was.

(R., p. 46, 1.19).

It should be noted that prior to turning his blue lights, Coon did not mention any action that could have been described as "erratic driving". It was after Coon turned his blue lights that

he allegedly observed Hooper making hard right turn, without signal. However, Coon also testified that Hooper's vehicle did not hit any curb, which would have been the logical consequence of Hooper making hard right turns. Hooper avers that Coon's testimony was replete with inconsistencies.

Q. Can you describe this attempt to turn in more detail for the jury?
A. The attempt to turn, to me where the vehicle was trying to exit the roadway using no turn signal, but there's several turnoffs right there. There's a couple into the dealership itself, and then a BB&T Bank is beside it, and then Walker Drive is the next road to the right after that.

(R., p. 47, 11.18).

Q. So you didn't see him drive?
A. Up to the traffic light, no, sir. Once he left the traffic light, yes, sir.
Q. So you got blue lights on him which means what?
A. That means he's getting pulled over, sir.
Q. So that means he's got to try to get over, right?
A. That's correct, sir.
Q. So he was having difficulty finding the appropriate spot to pull over?
A. If that's what he did, sir. I mean, it was well lit and very wide. Several areas he could've pulled off in clear sight.
Q. Like what?
A. Like a driveway.
Q. Driveway of what?
A. A dealership.
Q. Where did he end up turning right at?
A. On Walter Drive.
Q. So he turned down a road?
A. That's correct, sir.
Q. And where he stopped was in a very open parking lot; is that right?
A. It was the edge of the road, sir. There's several vehicles. That's an automotive repair shop that keep vehicles there.
Q. Is it the same place that testing's done here on the video?

04.	A.	Yes, sir.
05.	Q.	And you're saying that there was cars somewhere
06.		there?
07.	A.	I said it's an automotive service area. They
08.		repair cars there.
09.	Q.	Yes, sir. Could you see any of those cars in
10.		the video?
11.	A.	I don't recall, sir. I know where my car was
12.		placed at.
13.	Q.	Was it near a car?
14.	A.	My car was parked behind his vehicle. It was
15.		angled to the front door of the business.
16.	Q.	Other than your cars, was there any other cars
17.		near your vehicles?
18.	A.	I didn't pay attention to those cars, sir.
19.	Q.	He safely went to where he ended up, right?
20.	A.	There was no altercation or anything like that.
21.		Yes, sir. I mean, he safely went there.
22.	Q.	And when I -- when I ask that question, I'm
23.		asking about the vehicles. He didn't run into
24.		anything or hit a curb or anything like that, right?
25.	A.	No, sir.

(R., pp. 53 & 54).

There was traffic on a Friday night with the Halloween parties. The officer said Hooper was making hard right turns which was impossible without hitting a curb. Coon stated Hooper did not hit a curb. (R., p. 54, 22.25). Coon also testified that Hooper stopped at the edge of the road and there were several vehicles, and in the same breadth, stated that he did not recall seeing any car in the video. (R., p. 53, 24.25 & p. 54, 1-12). The officer embellished.

The very reason the statute says the arresting officer must have the video from the initiation of the blue lights is to lessen the State's subjective analysis with video proof of the existence of the drunk driving –or not. There was not here.

Law enforcement is bound to obey laws concerning Driving Under the Influence, just as Hooper was.

" [A] court must abide by the plain meaning of the words of a

> statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation."

State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011).

"By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of §56-5-2953 and, in turn, promulgated a severe sanction for noncompliance." *Town of Mt. Pleasant* at 349.

In *Town of Mount Pleasant*, Justice Beatty found that "the Town failed to establish any statutory exception to excuse its noncompliance"; and, affirmed Judge Nicholson's reversal of Roberts' conviction, and subsequent dismissal. *Id.* at 350.

Hooper reiterates that his arrest and conviction should be reversed for failure of the State to comply with the statute on videotaping requirement. Coon, who was the arresting officer, was unable to videotape the DUI arrest; and he failed to comply with the Affidavit requirement which has the ability to negate the lack of video.

Hooper maintains that the video submitted by Trooper Griffin is inadmissible for the following reasons: (1) it was not done by the arresting officer; (2) it did not capture the traffic stop; and, thus, it did not establish probable cause.

CONCLUSION

For the foregoing reasons, Hooper respectfully prays this Court reverse the decision of the lower court which disregarded the triad of statutory violations to affirm the jury's decision. The affirmation is not simply an error of law. It constitutes errors of law. The Court abandoned its obligation to make findings which promote the statute's legislative intent. Hooper's conviction should be vacated.

(SIGNATURE PAGE TO FOLLOW)

s/Donald L. Smith
Donald L. Smith (Bar No: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attomeydonaldsmith@gmail.com
Attorney for Appellant

Anderson, SC
October 15, 2020.

FORM 16
CERTIFICATE OF COUNSEL

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh Judge

C.A. Nos.: 2017-GS-04-0365
Appellate Case No. 2019-001502

State of South Carolina, Respondent,

v.

Dustin Lee Hooper, Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certify that this Final Brief of Appellant complies with Rule 211(b), SCACR

s/Donald L. Smith
Donald L. Smith (SC Bar#6699)
122 N. Main Street
Anderson, SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

Anderson, South Carolina
October 15, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2019-001502

The State, Respondent,

vs.

Dustin Lee Hooper, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID R. WAGNER
Solicitor, Tenth Judicial Circuit

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. This Court does not have jurisdiction to consider this appeal and should dismiss the appeal as untimely because Appellant filed successive post-trial motions or if the first post-trial motion was a nullity, his second motion was untimely.

II. The trial court properly denied Appellant's motion to dismiss and for directed verdict because a proper video was produced and the State had ample evidence to convict.

STATEMENT OF THE CASE

This case has an extensive procedural history. Appellant was indicted for driving under the influence (DUI). On March 5-6, 2019, he proceeded to trial before the Honorable R. Lawton McIntosh. The jury found him guilty of DUI. On March 8, 2019, the trial court issued an order allowing Appellant to stay out on bond and indicating it was deferring sentencing until after an appeal has concluded. Shortly thereafter on March 15, 2019, Appellant filed a Motion to Reconsider pursuant to Rule 29, SCRCrimP. (Motion for Reconsideration; R.10). On July 25, 2019, the trial court held a hearing on the Motion to Reconsider. At the hearing, the trial court entered sentence for Appellant. (Sentencing Sheet; R.8). On the same date as the hearing, the trial court orally denied the Motion to Reconsider.

On August 8, 2019, Appellant served and filed a Motion for Relief of Judgment Pursuant to Rule 60(b)(1) in which he made the same arguments made in the Motion to Reconsider. (Motion for Relief of Judgment Pursuant to Rule 60(b)(1); R.22). Appellant then filed on August 9, 2019, a Motion to Amend seeking to rename the Motion for Relief of Judgment as a Motion to Vacate Judgment. (Motion to Amend; R.31). At the same time, he filed his Motion to Vacate Judgment, again making the same arguments made in the Motion to Reconsider and the Motion for Relief of Judgment. (Motion to Vacate Judgment; R.34).

On August 27, 2019, Judge McIntosh filed an Order stating: "The Motion to Amend, Motion to Vacate Judgment and Motion for Relief of Judgment in case number 2017-GS-04-0365 is DENIED without the necessity of a formal hearing." (Order Denying Motion; R.4). Subsequently, on August 29, 2019, the trial court held a hearing on the various motions filed by Appellant. On the same date, the trial court issued a second order denying Appellant's Motion to Vacate Judgment. (Order Denying Defendant's Motion to Vacate; R.6). Appellant served and

filed his Notice of Appeal on August 30, 2019. The State moved to dismiss the appeal, which was denied.[1] This brief follows.

[1] Motion to Dismiss and Order are both on file with this Court.

STATEMENT OF FACTS

On October 29, 2016, Deputy Coons received a "be on the lookout" (BOLO) call for a reckless driver in his vicinity. (T.5-6; R.45-46). Coons spotted a vehicle with the same license tag, though it was a different color than the one called in by a civilian. (T.6-7; R.46-47). After verifying the tag number, he turned around behind the vehicle. He initiated his blue lights after the vehicle made several attempts to get to the right-hand side of the road without using a turn signal. (T.7; R.47). The vehicle stopped and Deputy Coons made contact with the driver. (T.7-8; R.47-48). When asked for his license and registration, Appellant never produced a driver's license and instead attempted to hand the deputy a debit card. Deputy Coons noticed the smell of alcohol coming from Appellant, as well as the smell of marijuana in the vehicle. (T.8; R.48). Appellant was dazed, his speech was slurred, and he appeared disoriented. (T.9; R.49). Deputy Coons also noticed an open bottle of Crown Royal in the passenger's seat. (T.9; 17; R.49; 57).

Trooper Griffin with the South Carolina Highway Patrol received the same BOLO as Deputy Coons. (T.29; R.69). He saw Deputy Coons with his blue lights on behind a vehicle matching the BOLO so he pulled in behind. He arrived as Deputy Coons was speaking to Appellant in the driver's seat. (T.29-30; R.69-70). Trooper Griffin spoke to Appellant, who admitted driving. (T.30; R.70). Trooper Griffin noticed the odor of alcohol coming from Appellant, as well as his disorientation and slurred speech. (T.30; R.70). He had Appellant perform three field sobriety tests—the HGN, the walk and turn, and the raise one foot tests. Appellant failed to properly perform on all tests. (State's Exhibit 1; T.30-35; R.70-75). After being arrested, Appellant was offered a breath test and refused. (T.39; R.79).

ARGUMENT

I. This Court does not have jurisdiction to consider this appeal and should dismiss the appeal as untimely because Appellant filed successive post-trial motions or if the first post-trial motion was a nullity, his second motion was untimely.

This Court is without jurisdiction to consider this appeal because the Notice of Appeal was not timely served. Appellant filed successive post-trial motions, which means his Notice of Appeal after the denial of his second post-trial motion was untimely. Even if the first post-trial motion was a nullity under the unique facts of this case, his second motion was untimely served and filed and, again, his Notice of Appeal was untimely. Accordingly, this Court should dismiss this appeal and not consider it on the merits.

As discussed above, this case has an extensive procedural history which results in the appeal not being timely filed. Appellant served and filed his first Motion to Reconsider, which was considered and ruled upon by the trial court on July 25, 2019. As a result of the denial of his Motion to Reconsider, Appellant should have served and filed a Notice of Appeal no later than August 5, 2019. Instead, he served and filed a subsequent motion—albeit one that does not exist under the South Carolina Rules of Criminal Procedure—untimely on August 8. Even considering his attempt to amend the motion, the second motion was still an incorrect attempt at a subsequent motion to reconsider. The trial court did not have jurisdiction to consider the second motion. As a result, his Notice of Appeal from the denial of his second motion was untimely. See State v. Pfeiffer, 427 S.C. 10, 828 S.E.2d 764 (2019) ("Successive Rule 29(a) motions are generally not permitted."); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004) ("[A] second motion for reconsideration . . . is appropriate only if it challenges something that was altered from the original judgement as a result of the initial motion for reconsideration."

(discussing Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 3–4, 518 S.E.2d 56, 58 (Ct. App. 1999))).

Additionally, because sentencing did not occur until July 25, 2019, a Motion to Reconsider would not have been proper until after sentencing. See Rule 29, SCCrimP. Appellant's first Motion to Reconsider, which admittedly was filed before July 25, was considered by the Court on July 25 and orally denied the same day. It should be considered timely made, however, because the trial court considered it only after sentencing and all parties considered it as a properly filed motion. The motion was denied, thereby rendering the second post-trial motion, which raised the same grounds as the original motion, and did not address any ruling changed as a result of the initial post-trial motion, a successive post-trial motion.

However, even if this Court considers the first Motion to Reconsider a nullity because Appellant was not sentenced until July 25, 2019, and the motion was filed prior to that date, his second motion was required to have been served and filed within ten days of sentencing, or no later than August 5, 2019. See Rule 29, SCCrimP ("Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence."). Instead, the motion was made on August 8, 2019 and was, therefore, untimely.[2] Because the second motion was untimely filed, it should not have been considered by the trial court and did not stay the time for the service and filing of the Notice of Appeal.

As a result, whether this Court considers the second post-trial motion successive or untimely filed, this Court does not have jurisdiction to hear this appeal because a timely Notice of Appeal was not served. See State v. Devore, 416 S.C. 115, 119, 784 S.E.2d 690, 692 (Ct. App.

[2] It is important to note the date of filing with the Clerk of Court on the bottom of the Motion for Relief of Judgment. (Motion for Relief of Judgment; R.22).

2016) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." (quoting USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008))); Rule 203(b)(2), SCACR ("After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed. When a timely post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion."). Accordingly, this Court should dismiss the appeal and not consider the merits.

II. The trial court properly denied Appellant's motion to dismiss and for directed verdict because a proper video was produced and the State had ample evidence to convict.

Appellant maintains the trial court erred in finding a proper video was admitted and in finding sufficient evidence to allow the case to proceed to the jury. He asserts Deputy Coons should be considered the arresting officer and not Trooper Griffin. He contends because Deputy Coons did not produce a video, because his vehicle was not equipped with recording equipment, the case should have been dismissed. However, Trooper Griffin was the arresting officer and properly supplied a video in compliance with section 56-5-2953 of the South Carolina Code. Additionally, Trooper Griffin did not need to personally see Appellant driving to be able to arrest him for DUI. Finally, there was clear reasonable suspicion to stop Appellant, which was known to Trooper Griffin and he could further rely on the information provided by Deputy Coons.

In criminal cases, the court of appeals sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). "The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)).

> All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. A statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself.

State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) (internal citations omitted).

"The legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted). Pursuant to Section 56-5-2953:

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

S.C. Code Ann. § 56-5-2953(A) (Supp. 2016). Additionally, subsection (B) specifies:

> Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition . . . or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to

> produce the video recording based upon the totality of the circumstances . . . .

S.C. Code Ann. § 56-5-2953(B) (Supp. 2016). The initial question is which officer should be considered the "arresting officer" and was, therefore, responsible for providing a video recording meeting the requirements of section 56-5-2953(A).

This Court considered a similar question in State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). In Landis, a State Transport Officer initiated his blue lights and performed the stop of the defendant. A Trooper was behind the Transport Officer and pulled in behind after the stop. The Transport Officer removed Landis from the vehicle, but the Trooper performed the field sobriety tests and ultimately arrested the defendant for DUI. The Trooper provided an affidavit indicating his vehicle's equipment malfunctioned, but no such affidavit was obtained from the Transport Officer who actually conducted the stop. Id. at 100, 606 S.E.2d at 505. This Court concluded the Trooper was the arresting officer and indicated:

> Pellucidly, the record supports the finding that Trooper Davis was the "arresting officer" as that phrase is ordinarily understood. Trooper Davis personally observed Landis' driving prior to the traffic stop. He arrived at the scene simultaneously with the State Transport Officer. Trooper Davis pulled in directly behind the Transport Officer and approached just after Landis had been removed from his vehicle. Moreover, Trooper Davis conducted the field sobriety test, determined Landis was impaired, and **placed him under arrest for DUI.**

State v. Landis, 362 S.C. 97, 104, 606 S.E.2d 503, 506 (Ct. App. 2004) (emphasis in original). While this Court did indicate the Trooper saw Landis driving, the emphasis by the Court is placed on the fact the Trooper "**placed him under arrest for DUI.**" The Court acknowledged the Transport Officer conducted the actual stop, but indicated his role was "facilitating the traffic stop."

Appellant claims "Trooper Griffin did not observe Hooper's driving and was not present during the stop." (App. Br. 5). The record belies this assertion. While Deputy Coons initially saw Appellant driving after receiving the BOLO, and pulled Appellant over based on the reckless driving BOLO, Trooper Griffin also saw the violation occur because he witnessed Appellant driving. Trooper Griffin was asked: "You saw him driving because you were driving in the opposite direction, right?" Trooper Griffin responded: "Yes, sir." He further indicated: "At the time I saw him, he was already being pulled over and was turning right." Counsel followed up: "But he was still driving?" The Trooper answered: "Yes, sir." (T.42-43; R.82-83).

The instant case should be considered no different than Landis. While Deputy Coons conducted the stop, Trooper Griffin interacted with Appellant, performed the field sobriety tests, determined Appellant was intoxicated and materially and appreciably impaired, and placed Appellant under arrest for DUI. (State's Exhibit 1). Based on the clear language of the statute and the common, ordinary definition of "arresting officer," this Court should find Trooper Griffin is the arresting officer and the one responsible for providing a video recording of the incident scene.

Additionally, everything required to be recorded by section 56-5-2953(A) occurred after Trooper Griffin arrived at the scene and was recorded by Trooper Griffin's camera. He started his camera upon activation of blue lights. It recorded the field sobriety tests being performed, it showed the arrest, and it showed Miranda warnings being read. (State's Exhibit 1). A proper video was provided by the arresting officer, so there was no reason for the court to dismiss the case.[3]

---

[3] Even if some aspect of the video was missing or improper, this Court should affirm the trial court's refusal to dismiss the case pursuant to Section 56-5-2953(B) which allows the court to consider the totality of the circumstances in allowing a case to proceed. In the instant case, there was ample circumstances justifying the way in which this case was presented. Deputy Coons, after receiving a BOLO for reckless driving, should not be required to just allow Appellant to

Appellant contends the video must show the stop itself. However, that is not included anywhere in the language of the statute. Requiring the video to include the stop would be to write into the law requirements which do not otherwise exist and were not intended by the legislature. See Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute."). As three Justices frankly reiterated in a recent case: "If it were true courts have the authority to interpret statutes according to a sense of justice and right, then courts would have the power to rewrite statutes to suit their own personal preferences, regardless of legislative intent. **Courts do not have that power**." Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n, 424 S.C. 542, 553, 819 S.E.2d 124, 130 (2018) (Few, J. concurring) (emphasis added).

In addition, Appellant claims the video needs to show the "violation," otherwise "the reason for the stop could not be ascertained" and to protect the public from "baseless, invalid, or unlawful stops." (App. Br. 12-13). In this case, either officer had ample reasonable suspicion in order to stop Appellant's vehicle without seeing any additional driving infraction. The reason the officers were looking for Appellant was because of a BOLO that was issued. The BOLO was issued because a citizen called in the concern for a reckless driver. The information indicated the type of car, the license tag, and the area in which the car would be located. This scenario is nearly identical to Navarette v. California, 572 U.S. 393 (2014) (finding caller's 911 call about reckless

---

continue driving without making a stop because he did not have a camera. Once he made the stop, which was clearly in the interest of the public's safety, he turned the situation over to Trooper Griffin who had a camera and could properly record what took place. Trooper Griffin's recording began as soon as practicable and included every aspect required by Section 56-5-2953(A) to the extent possible. See e.g., State v. Henkel, 413 S.C. 9, 774 S.E.2d 458 (2015).

driver was reliable and provided sufficient reasonable suspicion to justify traffic stop even when officer failed to see any improper driving).

In the instant case, the stop was proper because either officer had reasonable suspicion resulting from the BOLO and Deputy Coons developed additional reasonable suspicion when Appellant attempted to move to the right without using a turn signal. While Deputy Coons conducted the actual stop of Appellant's vehicle, Trooper Griffin was the clear "arresting officer" and therefore the one responsible for providing a video. Trooper Griffin had all the necessary reasonable suspicion to stop Appellant, saw Appellant driving, interacted with Appellant at the incident scene, conducted the field sobriety tests, determined Appellant was impaired, and placed Appellant under arrest for DUI. Additionally, all of Trooper Griffin's interactions with Appellant were recorded and presented to the court and jury. (State's Exhibit 1). As a result, the trial court properly refused to dismiss Appellant's case as the State fully complied with section 56-5-2953 of the South Carolina Code.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

DAVID R. WAGNER
Solicitor, Tenth Judicial Circuit

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

October 20, 2020

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2019-001502

The State, Respondent,

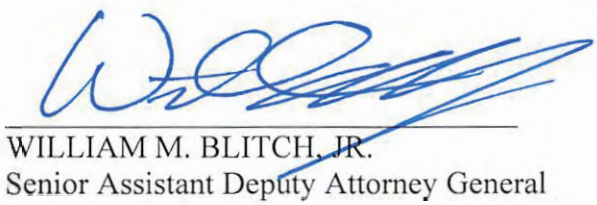
vs.

Dustin Lee Hooper, Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed October 20, 2020, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 20th day of October, 2020.



WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

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This 20th day of October, 2020.

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of General Sessions

R. Lawton McIntosh Judge

C.A. Nos.: 2017-GS-04-0365
Appellate Case no. 2019-001502

State of South Carolina, Respondent,

v.

Dustin Lee Hooper, Appellant.

FINAL REPLY BRIEF OF THE APPELLANT

Donald L. Smith (SC Bar #: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

Anderson, SC
October 15, 2020.

Other Counsel of Record:

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
Post Office Box 1 1 549
Columbia, SC 2921 1
(803) 734-3727

DAVID R. WAGNER
Solicitor, Tenth Judicial Circuit
PO Box 8002,
Anderson, SC 29691
(864) 260-4046

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes

STATEMENT OF THE CASE

Appellant adopts and incorporates by reference the Statement of Case and Facts presented in his Initial Brief. This appeal is brought pursuant to the dismissal by the trial court of Appellant's motion for directed verdict and motion to vacate judgment. Appellant timely filed his Notice of Appeal and filed his Initial Brief on December 18, 2020. Respondent filed its Initial Brief on June 25, 2020.

ARGUMENTS

I.

RESPONDENT CANNOT RAISE THE ISSUE OF TIMELINESS FOR THE FIRST TIME ON APPEAL

Respondent contends the Motion for Relief of Judgment and Motion to Amend and Motion to Vacate were not timely filed. Respondent raised the issue of timeliness since the Motion for Relief of Judgment was stamped August 8, 2019, instead of August 5, 2019, the tenth day from imposition of sentence on July 25, 2019. It should be noted that Appellant's motion was mailed to the court and Respondent on August 5, 2019. Absent a provision prohibiting filing and serving motions in criminal cases by mail, Appellant believes that filing and service by mail is complete upon mailing.

Rule 29(a) of the SCRCrimP provides that the time for appeal for all parties shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion. The trial court denied Appellant's on August 29, 2019. He served and filed his Notice of Appeal on August 30, 2019, well within the time limit.

More importantly, Respondent did not raise the issue of timeliness in its Response to Appellant's motions nor in the hearing of the motions on August 29, 2019. Objections not raised in the trial court cannot be relied on in the appellate court. Wilson v. Clary, 212 S.C. 250, 47

S.E.2d 618 (1948) as cited in Doe v. SBM, 327 S.C. 352 (1997).

> As a general rule, an issue may not be raised for the first time on appeal but must have been raised to the trial judge to be preserved for appellate review. Issues not raised in the trial court will not be considered on appeal.

Anonymous v. State Board of Medical Examiners, 323 S.C. 360, 473 S.E.2d 870, 879 (Ct. App. 1996).

II.

THE TRIAL COURT'S DECISION SHOULD BE REVERSED FOR VIOLATION OF THE VIDEOTAPING LAW.

Respondent contends that the traffic stop, arrest and subsequent conviction of Appellant was justified because Respondent produced a video of Appellant showing his field sobriety test. Appellant maintains that the video does not make the stop and the arrest a valid one for the following reasons: (1) it was incomplete; (2) it was not recorded and produced by the arresting officer; and, (3) Respondent did not submit the required Affidavit. As such, Respondent is considered as not to have complied with the videotaping requirements, or S.C. Code Ann.§ 56-5-2953, at all.

The DUI Videotaping Statute

SC Code Ann. §56-5-2953(A) mandates police vehicles to be equipped with recording equipment. It 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;
>
> (B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the

> arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit.

The video submitted was incomplete and tainted, and does not comply with the provisions of S.C. Code Ann.§ 56-5-2953.

First, as previously alleged by Appellant, the video that Respondents provided to herein Appellant did not show when the blue lights were activated in relation to the stop. It only showed the car with the blue lights already on. The video was also missing an audio recording. This prevented the jury from hearing the entire audio recording.

This video requirement provides a semblance of due process for Defendant. It is well-established that a police officer may stop a vehicle when the officer has probable cause to believe a traffic violation has occurred, or when the officer has reasonable suspicion the occupants are involved in criminal activity. State v. Burgess, 394 S.C. 407, 412, 714 S.E.2d 917, 919 (C. App. 2011)). In this case, the traffic stop was effectuated based on an anonymous tip. And while anonymous tip can provide the basis of a stop, the officer conducting the stop has to verify the tip's reliability by observing the suspect engaged in criminal activity. Alabama v. White, 496 U.S. at 331, 110 S. Ct. 2412.

It is admitted that Officer Coon responded to a BOLO call for a red Honda Civic with tag JKB-851 that was allegedly being driven recklessly. Based on Officer Coon's testimony, his interest has been piqued by Appellant's vehicle when he first observed the same "underneath the bypass at a stoplight." (R., p. 46, 8-14). He admitted that he turned around and seeing that the color of Appellant's vehicle did not fit the anonymous tip's description, Officer Coon had to call the dispatch for confirmation. (R., 46, 15-25 & p. 47, 1). It was upon that point that Officer Coon initiated his blue lights. (R., p. 47, 2-10). Prior to turning the blue lights, Officer Coon did

not mention seeing Appellant speeding or driving erratically. It was after Coon turned his blue lights that he allegedly observed Hooper making hard right turn, without signal. Officer Coon did not personally observe Appellant's vehicle in violation of any traffic laws.

Neither did Trooper Griffin have reasonable suspicion as he had not personally observed Appellant's driving. Respondent contends that Trooper Griffin saw the violation occur because he had seen Appellant driving from the opposite side of the road. (Initial Brief of the Respondent, p. 15). In the same breadth however, Respondent cited Trooper Griffin's testimony that at the time he saw Appellant, the later was already being pulled over. *Ibid.* Clearly, he has not observed Appellant's driving to form a reasonable suspicion that it was beyond the speed limit nor that it was reckless.

This blind reliance on an anonymous tip could have been prevented had the video been initiated as soon as Officer Coon ascertained any violation committed by Appellant. Unfortunately, he had not observed any offending action. He initiated the blue lights solely based on the BOLO call.

Without the video, the reason for the stop could not be determined. Defendant maintains that the video needed to include the entire procedure, including the stop conducted upon Appellant. As presented, the video did not show how and why Officer Coon stopped Appellant. The video started with Appellant's and the patrol cars already parked, and the officer approaching Defendant. The legislature did not intend only those events enumerated in the statute to be recorded. State v. Taylor, 768 S.E.2d 71 (S.C. Ct. App. 2014). The plain language of the statute demonstrates the legislature intended video recording of the majority of an officer's encounter with a potential DUI suspect. *Ibid.*

Additionally, the video submitted had missing audio recording. This prevented the jury from hearing the entire audio recording. The recording would have given the jury the opportunity to see the defendant conduct himself while addressing the requests of law enforcement. On the same token, it allows a jury to see what the State considers appreciably impaired. With the video incomplete, it is inadmissible for being tainted. Without this video that would illustrate these facts, Appellant was prejudiced to the point that the whole process was unreliable.

Since neither Officer Coon nor Trooper Griffin proved had a reasonable and articulable suspicion that Appellant had been driving recklessly, the traffic stop is not legitimate. Any and all evidence derived from such stop should have been suppressed.

The arresting officer failed to produce the videotape in violation of the DUI videotaping statute.

According to Officer Coon, he did not videotape the stop since he did not have the equipment to do so. This is no longer a valid excuse since the Appellate Court in the case of *Town of Mt. Pleasant,* found that the protracted failure to equip its patrol vehicles with video camera defeated the intent of the Legislature. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011). It has been twenty-two (22) years since section 56–5–2953 and the overall DUI reform enacted in 1998. The ACSO has yet to fully implement this requirement.

Trooper Griffin submitted a deficient videotape of the DUI arrest. The very reason the statute declares the arresting officer must have the video from the initiation of the blue lights is to lessen the State's subjective analysis with video proof of the existence of the drunk driving–or not. There was none here.

No sworn affidavit was provided by the arresting officer as required

in § 56-5-2953 (B).

Because the statute was violated when the proper video is not submitted, the arresting officer must submit a sworn affidavit in compliance with § 56-5-2953 (B).

> However, non-compliance with the recording requirement is excusable and is not alone a ground for the dismissal (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable and stating which reasonable efforts were made to maintain it; (2) if the arresting officer submits a sworn affidavit that it was physically impossible to produce the videotape because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) when an arrest is made and the camera has not been activated if video recording begins and conforms with the requirements as soon as practicable in circumstances including, but not limited to, roadblocks, traffic accident investigations, and citizen's arrests; or (4) for any other valid reason for the failure to produce the videotape upon the totality of the circumstances. § 2953(B).

State v. Taylor, supra.

The State relied on State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004) to explain away the statutory requirement that a person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct begin, not later than the activation of the officer's blue lights. In Landis, the video camera of the arresting officer was inoperable. However, he had witnessed the erratic driving of Mr. Landis and, therefore, had probable cause to pull him over. The arresting officer provided an affidavit which stated that his lack of video was due to his camera being inoperable. The certification of the inoperable video equipment satisfied the statutory requirement.

> MR. STOLARSKI: Oh, okay. This is a factual scenario, and it's almost identical to Landis. I would say that the only arresting officer is required to produce a videotape in compliance with the statute. Landis dealt with a situation where a state transport officer who didn't have video pulled over the defendant.

> 09. Right behind him came officer -- Trooper Davis
> 10. with the highway patrol. Officer pulled up behind
> 11. that officer. He ended putting him through field
> 12. sobriety tests and ended up arresting him for DUI.
> 13. Now, as it turns out, Officer Davis didn't have
> 14. a video either, but he had an affidavit stating why
> 15. he didn't have a video.

(R., p. 64, 2-15).

In the case at hand, Trooper Griffin did not provide an affidavit certifying why he failed to provide video "from the activation of the officer's blue lights". The plain language of the statute provides for those times when video is not available to satisfy section 56-5-2953(A). However, 56-5-2953(B) must be satisfied with certification for its absence by way of affidavit. Trooper Griffin failed to certify the lack of complete video and, therefore, failed to satisfy the mandatory provisions of section 56-5-2953.

> Failure by the arresting officer to produce the videotapes is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-2933, or 56-5-2945 if [exceptions apply] (emphasis added). Conversely, failure to produce videotapes would be a ground for dismissal if no exceptions apply.

City of Rock Hill v. Suchenski, 374 S.C. 12 (S.C. 2007).

Respondent has not complied with the requirements of section 2953(A) or the exceptions of section 2953(B) of the statute. Therefore, the dismissal of the charge is an appropriate remedy. *Ibid.*

CONCLUSION

Based on the foregoing, in addition to the arguments made in the opening brief, Appellant respectfully requests this Honorable Court to grant Appellant's appeal, and to reverse and vacate the judgment of the trial court.

{SIGNATURE TO FOLLOW}

s/Donald L. Smith
Donald L. Smith (SC Bar #: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attomeydonaldsmith@gmail.com
Attorney for Appellant

Anderson, SC
October 15, 2020.

FORM 16
CERTIFICATE OF COUNSEL

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

R. Lawton McIntosh Judge

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State of South Carolina, Respondent,

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CERTIFICATE OF COUNSEL

The undersigned counsel hereby certify that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR

s/Donald L. Smith
Donald L. Smith (Bar No. 6699)
122 N. Main Street
Anderson, SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

Anderson, South Carolina
October 15, 2020