

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari
To the Court of Appeals

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

RECEIVED

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S.C. Supreme Court

THE STATE,

Petitioner,

vs.

PHILLIP WESLEY SAWYER,

Respondent.

APPENDIX

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INDEX

SC COURT OF APPEALS OPINION NO. 2011- UP-263 (filed June 7, 2011)	1
RESPONDENT’S PETITION FOR REHEARING EN BANC	4
APPELLANT’S RETURN TO PETITION FOR REHEARING	15
ORDER DENYING PETITION FOR REHEARING	22

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Appellant,

v.

Phillip Wesley Sawyer,

Respondent.

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Unpublished Opinion No. 2011-UP-263
Heard March 10, 2011 – Filed June 7, 2011

AFFIRMED

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott, Assistant
Attorney General William M. Blich, Jr., all of

Columbia; Solicitor Barry Joe Barnette, of
Spartanburg, Appellant.

Assistant Appellate Defender LaNelle Durant, of
Columbia, for Respondent.

PER CURIAM: The State contends the circuit court erred in suppressing the videotape, evidence, and breath test results produced at the breath test site following Phillip Sawyer's (Sawyer) arrest for driving under the influence. Despite the State's failure to record the audio portion of Sawyer's breath test pursuant to section 56-5-2953 of the South Carolina Code (2006),¹ the State claims any deficiencies in the recording went to the weight of the evidence and not its admissibility.

We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: S.C. Code Ann. § 56-5-2953(A) (2006) ("A person who [commits a DUI] must have his conduct at the incident site and the breath test site videotaped. . . . The videotaping at the breath site[] . . . must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test[] . . ."); S.C. Code Ann. § 56-5-2953(B) (2006) (stating noncompliance with subsection (A)(1) does not automatically require the dismissal of a DUI if the officer submits a sworn affidavit certifying: (1) the videotape equipment was inoperable and reasonable efforts were made to maintain the equipment; or (2) "it was physically impossible to produce the videotape because the person needed emergency medical treatment"; or (3) "exigent circumstances existed," and providing "[n]othing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape 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 videotape"); City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007) (stating in criminal cases, the appellate court reviews errors of law only; therefore,

¹ Because Sawyer was charged in 2007, prior to the 2009 amendment of this section, we apply the language of the pre-amended statute.

this court's scope of review is limited to correcting the circuit court's errors of law).

AFFIRMED.

WILLIAMS, GEATHERS, and LOCKEMY, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

Appellant,

vs.

PHILLIP WESLEY SAWYER,

Respondent.

PETITION FOR REHEARING EN BANC

On June 7, 2011, this Court affirmed the decision of the magistrate court. The Court found pursuant to section 56-5-2953(A) and (B) the State failed to properly produce a videotape as required by the statute, and found there was no affidavit or other grounds for admitting the videotape pursuant to 56-5-2953(B).

Pursuant to Rule 221, SCACR, the Appellant State of South Carolina submits that in affirming the magistrate court's decision, the panel overlooked or misapprehended the language of section 56-5-2953(A) and (B) as well as the legislative intent in requiring the videotape. Further, the Court overlooked or misapprehended the language of 56-5-2953(B) which allows the trial court to consider "any other valid reason for the failure to produce the videotape based upon the totality of the circumstances."

Finally, the State submits the Petition for Rehearing should be considered en banc because of conflicting opinions issued by panels of the Court of Appeals. A panel of this Court upheld the admissibility of the videotape even with audio and other deficiencies, finding the deficiencies went to the weight of the evidence and not the admissibility. See State v. Craig, Op. No. 2009-UP-603 (S.C. Ct. App. filed December 22, 2009). Accordingly, the State asks this Court to grant the Petition for Rehearing en banc, and reverse the decision of the magistrate and circuit courts.

I. This Court erred in affirming the trial court's suppression of the video recording of the breath test site, testimony or evidence that a breath test was offered or administered, and the results of Respondent's breath test.

This Court overlooked or misapprehended the clear and unambiguous language of section 56-5-2953(A) and (B).

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). Further, it is a "well-settled rule of statutory construction, that a court is bound, if possible, to give some place and effect to every word found in a statute." Burns v. Gower, 34 S.C. 160, 13 S.E. 331, 332 (1891) (emphasis added); see also, Breeden v. TCW, Inc./Tennessee Exp., 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003) (finding

every "word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction").

Section 56-5-2953(A) of the South Carolina Code (Supp. 2006) requires: "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 videotaped." The statute specifies the required events of the breath test site that must be recorded:

2) The videotaping at the breath site:

(a) must be completed within three hours of the person's arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 or a probable cause determination that the person violated Section 56-5-2945, unless compliance is not possible because the person needs emergency medical treatment considered necessary by licensed medical personnel;

(b) must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test;

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

(d) must 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 videotape this waiting period. However, if the arresting officer administers the breath test, the person's conduct during the twenty-minute pre-test waiting period must be videotaped.

S.C. Code Ann. § 56-5-2953(A)(2) (Supp. 2006). Section 56-5-2953(B) of the South Carolina Code (Supp. 2006) requires the officer to produce the videotape or submit an affidavit explaining the failure to produce the videotape.

Deputy Evatt clearly complied with section 56-5-2953(A)(2) when he activated the camera system at the breath test site. He verified the camera was operational and verified video recording had begun. He could not verify whether audio recording began with the camera, but could verify a videotape was being created. All required events which must be recorded pursuant to section 56-5-2953(A)(2) were recorded and clearly visible on the videotape created by the recording system. No portion of the required recordings was missing or unrecorded.

Further, the State produced a copy of this videotape as required by section 56-5-2953(B). This case does not involve the failure to produce the breath test site video recording. Respondent received a copy of the video recording and was able to review the contents of the recording. The videotape clearly shows the reading of the Miranda warnings, the officer informing Respondent of the videotape and his right to refuse the breath test, as well as all the breath test procedures. (T.34-40; R.21-27; Ct. Exhibit 1, DVD).

It is significant to note Respondent has never challenged the validity of the Miranda warning he was given, whether he was properly informed of the videotape and his right to refuse the breath test, nor the actual test procedures utilized by Deputy Evett. Additionally, counsel for Respondent conceded at oral argument the substance of what took place was not at issue, and there was no challenge to the Miranda warnings or other instructions required to be given under the statute.

The State has complied with section 56-5-2953 by producing a videotape with all required events documented. Thus, since the videotape was produced, an affidavit from the arresting officer meeting the requirements of section 56-5-2953(B) was not required, and the videotape and all evidence related to the breath test should have been admitted into evidence.

This Court's reliance on City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 897 (2007), is misplaced. In Suchenski, the arresting officer's vehicle recorder ran out of tape before the

defendant was arrested, and as a result, there was no recording of the last field sobriety test or the arrest, both events required to be recorded under the statute. Thus, under the statute, the officer could not produce a videotape of all of the required events. Unlike in this case in which all required events were properly recorded and clearly visible on the videotape produced by the State.

Further, this Court has overlooked prior cases in which defects in the evidence inure to the weight it is to be given by the jury and not to its admissibility. Any defects in the videotape go to its weight rather than admissibility. See State v. Dicapua, 373 S.C. 452, 636 S.E.2d 150, 153 (Ct. App. 2007) (Stilwell, J., concurring opinion) (lack of audio on surveillance videotape of drug sting went to the weight of the evidence, not its admissibility), *cert. granted* April 17, 2008; see also, State v. Salisbury, 330 S.C. 250, 498 S.E.2d 655, 665 (Ct. App. 1998) (conflict in testimony regarding condition of breathalyzer machine went to weight of the test results rather than admissibility of the evidence), *aff'd as modified*, 343 S.C. 520, 541 S.E.2d 247 (2001). Defects in evidence or procedure generally do not affect admissibility. See, e.g., State v. Odom, Op. No. 26624 (S.C. Sup. Ct. filed March 30, 2009) (Shearouse Adv. Sh. No. 15 at 11) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

Further, while not binding precedent, it is important to note this Court found in State v. Craig, Op. No. 2009-UP-603 (S.C. Ct. App. filed December 22, 2009), that a videotape with similar defects the result of a tracking error was admissible. This Court found any defects in the videotape went merely to its weight and not its admissibility and that a videotape was produced by the State. See Id. (citing S.C. Code Ann. § 56-5-2953(B) (2006) (stating that failure by the arresting officer "to produce" a videotape is not a ground alone for dismissal of a DUI charge if the arresting officer submits a sworn affidavit certifying that the video equipment was in an inoperable condition and that reasonable efforts have been made to maintain the equipment in an operable condition); State v.

Dicapua. 373 S.C. 452, 457, 646 S.E.2d 150, 153 (Ct. App. 2007) (Stilwell, J., concurring) ("The flaws in the videotape go to the weight of the evidence and not to its admissibility.")).

The statutory language required the production of the videotape. The tape was produced in this case and the State met the clear language of the statute. The legislative intent was to require the State to document the steps taken at the breath test to ensure a fair procedure was used and the intoxicated individual's rights were not violated. The videotape in this case meets that legislative intent because it shows Respondent being read his Miranda rights, being informed of the videotape and the right to refuse the breath test, the procedure used by Deputy Evett in conducting the breath test, and Respondent's acknowledgment and compliance with each step. At trial, Respondent would have the opportunity to challenge any deficiency in the procedures, and Deputy Evett would have the opportunity to explain the procedures used. It should then be up to the jury to determine the weight to assign to the evidence and testimony before them and then render their verdict.

This Court erred in affirming the circuit court's order suppressing the videotape of the breath test site, testimony or evidence of the fact a breath test was conducted, and the results of the breath test. The State complied with the statute requiring that a videotape be produced showing the required events at the breath test site. Any defect in the produced videotape affects its weight as will be determined by the jury and not its admissibility into evidence. As a result, this Court should grant the petition for rehearing en banc and reverse the decision of the circuit court, find the videotape admissible, and remand for trial.

- II. Given the totality of the circumstances and the affidavit submitted by Deputy Evett in this case, the trial court should have allowed the video recording, any evidence regarding the breath test, and the results of the breath test to be admitted.**

This Court also misapprehended or overlooked the provisions of section 56-5-2953(B). Given the totality of the circumstances in this case, especially considering the failure of the audio was completely beyond the control of the officer, the court should not have affirmed the suppression of the evidence.

Section 56-5-2953(B) contains a failsafe for the court to consider extenuating circumstances:

(B) Nothing in this section may be construed as prohibiting the introduction of other 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 videotapes 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 videotape equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating 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 videotape because the person needed emergency medical treatment, or exigent circumstances existed. . . . **Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape 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 videotape.

S.C. Code Ann. § 56-5-2953(B) (Supp. 2006) (emphasis added).

The solicitor asked the court to view the failure of the audio in light of the circumstances of the instant case and to consider the fact the failure was beyond the control of Deputy Evett and had even escaped routine maintenance because it was a malfunction that was not a chronically occurring problem. (T.72-73; 76-78; R. 59-60; 63-65). There was no failure on the part of Deputy Evett to perform his duty under the statute. He started the videotape when he was required to do so and

verified to the best of his ability that it was recording. As stated above, all events required to be recorded under section 56-5-2953(A)(2) were recorded and clearly visible on the videotape.

As Agent Baker explained, the only means to verify the videotape was functioning properly was to view what it was recording on a monitor. The main problem was at the time of this incident, there was no means to verify the audio was functioning properly. It is logical for Deputy Evett to assume because the video portion recorded and displayed properly on the monitor that the audio also worked.

This is not a situation in which the officer intentionally tried to manipulate the video, disguise his actions, or violate Respondent's rights. Deputy Evett did everything within his power to preserve on video the breath test site as required by section 56-5-2953. Given the totality of the circumstances, including the fact Deputy Evett followed proper procedure, he had no means prior to performing the test of verifying the functioning of the audio portion of the recording, and the fact Respondent has not challenged the actual procedures used by Deputy Evett, this court overlooked or misapprehended the totality of the circumstances failsafe provided by section 56-5-2953(B) in affirming the circuit court's decision finding the videotape and other breath test related evidence inadmissible.

Further, the statute allows the officer to file an affidavit indicating some exception to the requirements, including exigent circumstances, existed which resulted in the failure to comply with the statute. In this case, Deputy Evett provided an affidavit indicating exigent circumstances existed because he had no means of knowing the audio malfunctioned and its malfunction was beyond his control. (T.29-30; 77; 81; State's Exhibit 1; R. 16-17; 64; 68; 94). Deputy Evatt was the appropriate officer to file the affidavit because he was the only officer with personal knowledge of the breath test site. The intent of the statute, while indicating the arresting officer should produce

an affidavit is clearly to require the officer with personal knowledge of the videotape in question to produce the affidavit. Further, this Court should have found his affidavit sufficient given the circumstances of this case. See City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 897 (2007) (Burnett, J., dissenting opinion) (arguing exigent circumstances existed when the officer started tape, but it ran out prior to completion of the events required to be videotaped at the incident site). Accordingly, this Court should find suppression was improper because an exception to producing a videotape with full audio recorded was provided pursuant to section 56-5-2953(B).

III. En Banc consideration

En banc consideration is appropriate “(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.” See Rule 219, SCACR. Both grounds for consideration en banc are implicated in this Petition. The panel in the instant case has reached a conclusion that is opposed to the conclusions reached by another panel of this Court in State v. Craig, Op. No. 2009-UP-603 (S.C. Ct. App. filed December 22, 2009). En banc consideration is necessary in order to reach uniformity in the Court’s decisions. Further, the issue is of exceptional importance to any law enforcement officer who operates the video recording at the breath test site. As a result, a clear and definitive opinion regarding the admissibility of the video in this case is necessary. Accordingly, the State asks the Court to consider the Petition for Rehearing en banc and to rehear the case en banc to render an opinion consistent with prior decisions of the Court.

CONCLUSION

For all of the foregoing reasons, Appellant requests that the panel rehear this matter en banc, reverse the findings of the circuit court, and remand to allow the trial to proceed with the admission of the breath test site videotape, the evidence and testimony related to the breath test site, and the test results.

Respectfully submitted,

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Chief Deputy Attorney General

SALLEY W. ELLIOTT
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ATTORNEYS FOR APPELLANT

June 20, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

Appellant.

vs.

PHILLIP WESLEY SAWYER,

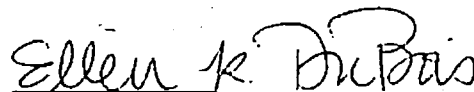
Respondent.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Petition for Rehearing En Banc by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. DuRant, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, S. C. 29211

I further certify that all parties required by Rule to be served have been served.
This 20th day of June, 2011.



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

APPELLANT,

V.

PHILLIP SAWYER,

RESPONDENT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

Opinion No. 2011-UP-263

RETURN TO PETITION FOR REHEARING

The Court of Appeals correctly affirmed the circuit court's decision to suppress Phillip Sawyers' videotape, evidence and breath test results produced at the breath test site following Sawyers' arrest for driving under the influence. The suppression was required in order to protect the rights of Sawyer and to insure that he received fair treatment pursuant to S.C. Code Ann. Section 56-5-2953 (A) (2006) because the State did not comply with the statute.

1. This Court correctly affirmed the trial court's suppression of the video recording of the breath test site, testimony or evidence that a breath test was offered or administered, and the results of Sawyer's breath test.

S. C. Code Section 56-5-2953(A) (2006) provided that the videotaping at the breath test site must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test. As the state pointed out, the language is clear and unambiguous, and the legislative intent must prevail. The Legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Cl. App. 2004). In interpreting a statute, the determination of legislative intent is a matter of law. Id.

As stated in Respondent's brief, the Legislature clearly intended for the videotape to include the sound portion since they required the reading of Miranda, as well as the person being informed of other rights and the implied consent form. Otherwise, the statute would have stated that the video portion was sufficient. Respondent's Brief pp. 9.

South Carolina Code Section 56-5-2953(A)(1)(a)(iii) provides that the video recording at the incident site must include the arrest of the person "and **show** the person being advised of his Miranda rights." Section 56-5-2953(A)(2) which describes what the video recording at the breath test site must include does not include the word "show." Therefore, if the Legislature meant that only the video portion at the breath test site was acceptable, they would have included the word "show" again. The spirit of the law and the "totality of the circumstances" require a logical reading of the statute.

This case involved the application of a statute to a clearly delineated set of undisputed facts. The State simply did not follow the statute because all of the requirements of the statute

were not provided. It was significant to know that Sawyer was read all of his rights as the trial judge pointed out that he recently had a case where the officer left out an important Miranda right. ROA 74, II. 3 – 25; ROA. 75, II. 1 – 15.

The State relies on the case of State v. Craig, Op. No. 2009-UP-603 (Ct. App. filed December 22, 2009) where this Court held that the defects in the videotape went to the weight and not admissibility of the videotape.¹ However, Sawyer's case is readily distinguished from State v. Craig because Craig's case involved the twenty minute waiting period prior to administration of the breath analysis test was not videotaped. Observing conduct of the defendant does not require audio and is not as important to the fundamental rights of a person to fair treatment. The audio portion where the rights were read to Sawyer, and where he was informed that he was being videotaped was important to the fair application of the statute.

This Court correctly relied on the case of City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007). All of the tape was not provided in that case where the officer's vehicle recorder ran out of tape before the last field test could be recorded, and all of the videotape was not provided in Sawyer's case where the required audio portion was not provided.

The state cited other cases where defects in the evidence went to the weight and not to admissibility which the state argued this Court overlooked in making its decision. One of these was State v. Dicapua, 383 S.C. 394, 608 S.E.2d 292 (S.C. Supreme Ct. 2009 affirming the Ct App.). However, Dicapua is distinguished because there was no statutory requirement that the drug sting be videotaped so the lack of the audio went to the weight of the evidence. It is also distinguished because the defendant consented to the admission of the videotape. Another case,

¹ Rule 239 (d)(2), SCACR provides that memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.

State v. Odom, 382 S.C. 144, 676 S.E.2d 124 (2009) involved the suppression of online chats between an undercover officer and the defendant in a child predator sting. The issue concerned violations of Memorandum of Understanding and the program standards of the Internet Crimes Against Children which were created by law enforcement and not statute. It did not involve a statutory requirement.

In reading the statute as a whole, the legislative language is clear that the videotape at the breath test site should include the audio portion as well as the video.

11. **Given the totality of the circumstances and the affidavit submitted by Deputy Evett in this case, the trial court was correct in suppressing the video recording, any evidence regarding the breath test, and the results of the breath test to be admitted.**

The state argued that the failure of the audio was beyond the control of Deputy Evett. However, Deputy Evett testified that he was not the arresting officer and that he did not check the microphones and did not know how. ROA. 27, ll. 18 - 25; ROA. 28, ll. 1 - 25.

As stated in Sawyer's brief, Section 59-5-2953(D) provides that SLED is responsible for monitoring all breath test sites to ensure the proper maintenance of video recording equipment. Agent Baker with SLED testified that he generally inspected each breath alcohol testing device once a quarter or every twelve weeks. He said they also try to inspect the video recording device at the same time. ROA. 34, ll. 19 - 25; ROA. 35, ll. 1 - 12. Then he testified that he learned of the problem with the equipment roughly one week before this hearing. When he researched the problem he testified that there was a problem with the equipment for about four months. ROA. 42, ll. 16 - 25; ROA. 78, ll. 11 - 25.

The trial judge ruled that there had not been a showing of sufficient maintenance of the system, and there was not a showing of sufficient review of the tapes. ROA. 82, ll. 2 - 20.

The affidavit submitted by Deputy Evett used the exigent circumstance exception for the complete videotape not being presented. ROA. 67, II. 13 – 25; ROA. 68, II. 1 – 25. The trial judge held that this was insufficient because the problem had been there but was not discovered until recently; therefore, exigent circumstances did not exist. ROA. 82, II. 1 – 25; ROA. 83, II. 1 – 14.

111. En Banc consideration

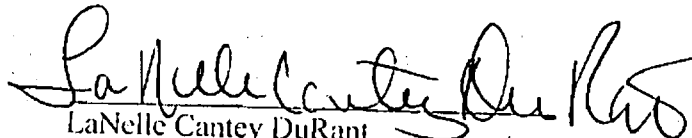
This case is not the type of case meant for en banc consideration. It is a DUI case with an unpublished opinion from this court. Pursuant to Rule 219, SCACR, the full court's review is not necessary because: (1) there is no conflict with previous decisions of this Court as demonstrated previously in this return; and (2) this case does not involve a question of exceptional importance. It involves the State not being compliant with the required statute. The state was responsible for maintaining the equipment which was not done.

The Supreme Court decided this issue in the recent case of Town of Mt. Pleasant v. Roberts, Op. No. 27005 (filed July 11, 2011), where the Supreme Court ruled that the town's failure to request additional video cameras from the Department of Public Safety for installation in its patrol vehicles was not a valid reason for a failure to produce a video recording of defendant's conduct during the underlying traffic stop; and thus the town was not excused from noncompliance with mandatory video-recording requirements. The Supreme Court ruled that the unexcused failure to video record defendant's conduct warranted dismissal of the case.

CONCLUSION

Based on the above reasons, the decision of this Court's panel affirming the trial court's order should stand.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

This 26th day of July, 2011.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Roger L. Couch, Special Circuit Court Judge

THE STATE,

APPELLANT,

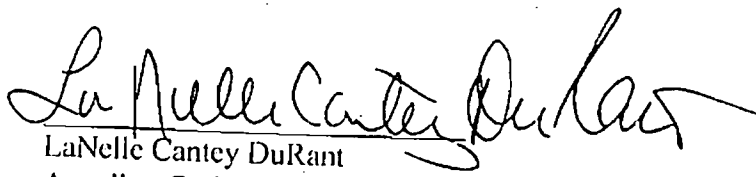
V.

PHILLIP SAWYER,

RESPONDENT

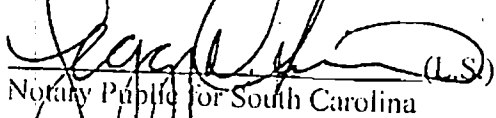
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blich, Jr., Esquire at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 26th day of July, 2011.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 26th day
of July, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017

The South Carolina Court of Appeals

The State,

Appellant,

v.

Phillip Wesley Sawyer,

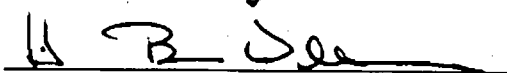
Respondent.

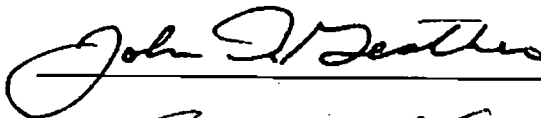
The Honorable Roger L. Couch
Spartanburg County
Trial Court Case No. 2007-GS-42-05840

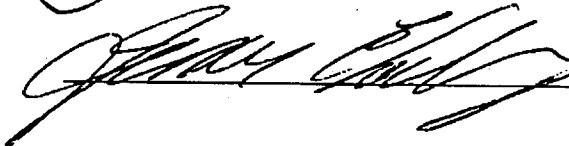
ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a 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.

It is, therefore, ordered that the Petition for Rehearing be denied.

 J. Williams

 J. Geathers

 J. Lockemy

Columbia, South Carolina

cc: Assistant Attorney General William M. Blitch, Jr.
Assistant Appellate Defender LaNelle Durant
Barry Joe Barnette, Esquire

FILED

SEP 19 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari
To the Court of Appeals

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

THE STATE,

Petitioner,

vs.

PHILLIP WESLEY SAWYER,

Respondent.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record,

LaNelle C. DuRant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

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

This 18th day of November, 2011.



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

THE STATE,

Appellant,

vs.

PHILLIP SAWYER,

Respondent.

AMENDED RECORD ON APPEAL

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INDEX

Order	1
Order on Post Judgment Motion	2
Transcript dated April 15 th	6
Transcript dated September 18 th	84
State's Exhibit 1, Affidavit	94
Certificate of Counsel	95
DVD	Filed as separate exhibit

COUNTY OF SPARTANBURG)
)
 State of South Carolina,)
)
 Plaintiff,)
)
 v.)
)
 Phillip Wesley Sawyer,)
)
 Defendant.)
 _____)

SEVENTH JUDICIAL CIRCUIT
 GENERAL SESSIONS COURT

ORDER

Ind: 2007-GS-42-5840

It is the **ORDER** of this court that the Defendant's Motion to Suppress Video Evidence be **GRANTED**. The video tape of the DataMaster test taken at the test site will be excluded based upon the fact that the video tape has no audio of the conversations between the testing officer and the Defendant concerning such matters as his Miranda warnings, the explanations of implied consent or other matters that may have been discussed between them.

However, this Court finds that the explanation given at the hearing that there was no way that the police officer could have known that the audio portion of the tape was not recording and that reasonable attempts had been made to maintain the equipment are sufficient to allow the case to go forward as allowed by South Carolina Code Section 56-5-2953(B). Such section providing as follows:

Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances. SC Code Ann § 56-5-2953(B).

Therefore, this Court will suppress the videotape evidence, but will allow the case to go forward on other evidence that may exist.

This Court makes further note that the case of City of Rock Hill V. Suchenski, 372 S.C. 12 (2007), did not consider whether or not the lower court should have allowed the prosecution to go forward based on other evidence since, "The City did not seek a post-judgment ruling from the circuit court on the potential applicability of §56-5-2953(B). This precludes our review of the applicability of the subsection(B) exceptions as we may only review the circuit courts order for errors of law. We cannot determine error regarding an issue not addressed by the circuit court." City of Rock Hill v. Suchenski, 374 S.C. 12, 16 (2007).

IT IS SO ORDERED.

June 16, 2008

MARC KITCHENS

18:01 PM 8 JUN 2008

APPROVED BY THE CLERK OF COURT



Judge Roger L. Couch
 Seventh Judicial Circuit

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
THE STATE,	)	
	)	
VS.	)	ORDER ON MOTION FOR POST-JUDGMENT
	)	RULING
	)	
PHILLIP WESLEY SAWYER,	)	CASE NO.: 07-GS-42-5840
	)	
<u>DEFENDANT.</u>	)	

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MARC KITCHENS

PROCEDURAL HISTORY

An order was issued by this court dated June 16, 2008. Defendant, through his counsel, filed a timely motion for a post-judgment seeking clarification or reconsideration of this order. A hearing was held on this motion on September 18, 2008 in the Spartanburg County Court of General Sessions. Present were the Defendant and his counsel, Andrew J. Johnston, Esq. and Gerald G. Wilson, Esq. Also present was Assistant Solicitor Zach Ellis of the Seventh Circuit Solicitor's Office who represented the State.

The subject matter of the earlier hearing which resulted in the June 16 order addressed the lack of audio recording accompanying a videotape of the administration of a breath test after Defendant had been arrested for DUI. In the aforementioned order, the court denied the Defendant's request to dismiss the case, but did order suppression of the "videotape evidence." However, the order did not explicitly address the motion made in the alternative to the defense motion to dismiss. This alternative motion was a motion to suppress not merely the videotape itself, but for suppression of the Datamaster testing itself and of its results.

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RULING AND BASIS

After hearing argument of counsel and review of the proceedings of the matter, I conclude that the June 16 order herein should be amended to address all issues. It was, and is, the intent of the court to specifically order suppression of both the Datamaster videotape evidence and of any testimony or evidence that a breath test was offered or administered to Defendant and any breath test results thereof.

The grounds for this suppression is that, in this case, the State failed to fully comply with the requirements of S.C. Code Ann. § 56-5-2953 (as amended 2007). This statute deals with the incident site and breath testing site videotaping which must be followed by law enforcement during a DUI arrest. This statute imposes requirements for DUI videotaping, the admissibility of evidence in a DUI case and the maintenance of equipment.

Subsection (A) of this statute requires that a person charged with DUI must have his conduct at the breath test site videotaped. It requires that the videotaping at the breath site: "must include the *reading* of Miranda rights, the entire breath test procedure, the person *being informed* that he is being videotaped, and that he had the right to refuse the test." (Emphasis added.)

While the State produced a "videotape" in this case; it did not produced a videotape with the sound recording which is clearly envisioned by the statute. This court concludes that the statute requires a sound recording of both the "reading" and of "the person being informed" of specific rights and information.

Subsection (B) of the statute provides additionally that "Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge." The statute does allow for a legal excuse for failures, when and if, certain other statutory criteria are met.



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In this case, the State argues the submission of a law enforcement affidavit setting forth exigent circumstances excuses the failure of the officer to produce a statutorily complaint videotape. The Affidavit herein claims excuse based upon "exigent circumstances." The specific exigency claimed here was that the audio was "inoperative" at the time of the test. An exigency is defined as a situation requiring immediate attention or remedy, if not an outright emergency situation. As the testimony at the hearing revealed, the State was not even aware of the malfunction until several months after this Defendant's arrest. Therefore, by definition, the malfunction could not have been considered an exigency. Moreover, proper maintenance of the breath test video equipment is imposed on SLED by statute. The State cannot be heard to complain of the existence of an "exigency" created by its own actions or inactions.

The court would also note that the Affidavit submitted by the State was not in full compliance with the requirements of §56-5-2953 in that the Affidavit was signed by the testing officer and not the arresting officer as the statute requires.

OTHER EVIDENCE NOT AFFECTED

Specifically not addressed by the court's ruling herein is the admissibility or not of other evidence that the State might present to prosecute this case other than the offer, administration and results of the breath test. At the trial of the case, the State should be free to offer other evidence in support of the charge against Defendant, including, but not necessarily limited to: evidence of the Defendant's driving, his admissions, results of field sobriety tasks and general observations on Defendant's demeanor.

CONCLUSION

After hearing testimony and arguments of counsel and reviewing the exhibits, I find that the videotape required by to be produced by the State in this case under § 56-5-2953, is defective in that

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no sound can be heard when Officer is reading *Miranda* warnings and informing the Defendant of his implied consent rights. Therefore, the requirements of § 56-5-2953 have not been fulfilled.

I further find that the Affidavit that was submitted, pursuant to § 56-5-2953, is defective in that there is not exigent circumstance as is envisioned by the statute and that the Affidavit is defective because it is not signed by the arresting officer. Therefore, the opportunity for the State to cure its failure to provide a complete videotape failed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the June 16, 2008 order herein should be amended. In this case, the Datamaster videotape evidence as well as any testimony or evidence that a breath test was offered and/or administered to Defendant and any breath test results are hereby suppressed.

IT IS FURTHER ORDERED that the State will still be free to offer other evidence in support of the charge against Defendant, including, but not necessarily limited to: evidence of the Defendant's driving, any admissions, results of field sobriety tasks and general observations on Defendant's demeanor.

AND IT IS SO ORDERED.

Spartanburg, South Carolina

October 5, 2008


 ROGER L. COUCH, JUDGE
 COURT OF GENERAL SESSIONS
 SEVENTH JUDICIAL CIRCUIT

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 SPARTANBURG COUNTY
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 MARC KITCHENS

1 STATE OF SOUTH CAROLINA)
 2 COUNTY OF SPARTANBURG) COURT OF GENERAL SESSIONS

3
 4 STATE OF SOUTH CAROLINA,) TRANSCRIPT
 5 PLAINTIFF,) OF
 6 VS.) RECORD
 7 PHILLIP WESLEY SAWYER,) 07-GS-42-5840
 8 DEFENDANT.)
 9

10 April 15th, 2008
 11 Spartanburg, South Carolina
 12

13 B E F O R E :

14 THE HONORABLE ROGER L. COUCH, Judge, and a jury.

15 A P P E A R A N C E S :

16 ZACHARY D. ELLIS
 17 ASSISTANT SOLICITOR
 18 Attorney for the State

19 ANDREW JOHNSTON AND GERALD WILSON
 20 ESQ.
 21 Attorneys for the Defendant

22
 23
 24 PAMELA E. GREEN
 25 Circuit Court Reporter
 Seventh Judicial Circuit

I N D E X O F W I T N E S S E S

<u>WITNESSES</u>	<u>PAGE</u>
Jury Selection	7
Motions	21
DAVID EVETT	
Direct examination by Sol. Ellis	30
Cross-examination by Mr. Johnston	40
Redirect examination by Sol. Ellis	45
BRETT BAKER	
Direct examination by Sol. Ellis	47
Cross-examination by Mr. Johnston	57
Redirect examination by Sol. Ellis	63
Argument by Solicitor Ellis	65
Argument by Mr. Johnston	80
Ruling by The Court	95
Certificate	97

1 discuss even what the case is about with anyone, including
2 each other, until you've heard all the evidence and I've
3 charged you and told you to begin your deliberations. Even
4 the most innocent discussion you might have about this type
5 of case or what's going on in this trial might tend to
6 influence your decision in this matter. And again, you've
7 been chosen as jurors with open minds in this matter and
8 keep your mind open until such time as you're heard all the
9 evidence and I've charged you concerning the law.

10 You're free to go at this time. Call after six
11 o'clock. They'll be instructions concerning the Sawyer case
12 on the call in number.

13 Thank you very much. You're free to go.

14 (Whereupon, the following takes place outside the
15 presence of the jury.)

16 THE COURT: All right. Mr. Johnston, you indicated
17 that there were some pretrial motions.

18 I'll be happy to hear you at this time.

19 MR. JOHNSTON: Thank you, Your Honor.

20 We have a motion in this case to dismiss the charges
21 against Mr. Sawyer for, at a minimum, in the alternative, to
22 suppress the purported results of the Data Master test
23 administered to him after he was arrested. I'll just
24 briefly tell you what I think the motion is going to be
25 about.

1 THE COURT: Just one second.

2 MR. JOHNSTON: Yes, sir.

3 THE COURT: One of the doors opened.

4 MR. JOHNSTON: Yes, sir.

5 THE COURT: Now you may proceed.

6 MR. JOHNSTON: Thank you, Your Honor.

7 Your Honor, as the Court knows, the State has been
8 required by the Legislature to follow certain procedures in
9 a driving under the influence arrest and prosecution. Some
10 of those procedures are set forth under Code Section
11 56-5-2953. Among other requirements of that statute,
12 subsection 2 requires that there be videotaping at the
13 breath site.

14 THE COURT: At the breathalyzer site?

15 MR. JOHNSTON: Yes, sir, at the breath site.

16 THE COURT: All right.

17 MR. JOHNSTON: Part of what much, must be videotaped at
18 the breath site are the reading of Miranda rights, the
19 entire breath test procedure, the person being informed that
20 he is being videotaped, and that he has the right to refuse
21 the test.

22 In this case, we're going to present to you the video
23 that was made at, at the breath site after Mr. Sawyer was
24 arrested. I don't believe the State will disagree with my
25 characterization of it. So, I'll just briefly characterize

1 it. But I believe what you will see is this.

2 The Spartanburg County Jail, which is where most of the
3 Data Master tests are administered in this county, uses a
4 procedure where there are two rooms. Those rooms are
5 separated by a plexiglass window with a hole being the only
6 access between the one room and the other. In the one room
7 is the actual---

8 THE COURT: With a hole in the window you're talking
9 about?

10 MR. JOHNSTON: Yes, sir.

11 THE COURT: Okay.

12 MR. JOHNSTON: Yes, sir.

13 THE COURT: I'm familiar with that set-up.

14 MR. JOHNSTON: All right, sir.

15 THE COURT: Yes, sir.

16 MR. JOHNSTON: And it's a little significant in this,
17 in this case and the only reason I mention is because there
18 is audio fine in the room where the officer and the Data
19 Master machine are located. In many videos I have seen
20 there is actually fine audio in the room where the subject
21 or the defendant stands.

22 In this particular case, the officer left the room
23 where the machine is and entered the room where the
24 defendant was. For whatever reason, there is no audio from
25 the encounter between the officer and the defendant in the

1 room where the defendant is, and we will argue to the Court
2 that because there is no audio from that encounter the State
3 has not complied with 56-5-2953(2).

4 So, that will be our argument.

5 Now, in this case, the State has offered up a, an
6 affidavit which they would contend, I believe, allows them
7 to come under certain exceptions. I believe that after
8 you've seen the tape and heard from the witnesses that
9 you'll find that these exceptions do not apply in this case.

10 THE COURT: Mr. Ellis, I'll be happy to hear from you
11 before we begin.

12 SOLICITOR ELLIS: Thank you, Your Honor.

13 The State would, would agree with the basic recitation
14 of Mr. Johnston of the facts concerning the Data Master and
15 the problems with the audio do exist. It is possible to
16 hear some audio during the testing. Once the officer comes
17 back around into the room where the booth, where the machine
18 is, both around the eight minute marker or so of the tape,
19 which is approximately a 43 minute long tape I believe, and
20 you can also hear some discussion with the defendant both
21 quiet, most of the time he spends time away from the glass,
22 or you can hear some interactions, and you also can hear the
23 officer very well the majority of the case.

24 However, as Mr. Johnston stated, the officer was in the
25 room with the defendant where the microphone functioned

1 initially.

2 56-5-2953 Subsection(a)(2) does state that must include
3 the, the reading of -- under Section B, Your Honor.

4 THE COURT: Give me that Code Section again. 56---

5 SOLICITOR ELLIS: Yes, Your Honor. 56-5-2953 looking
6 at---

7 THE COURT: All right.

8 SOLICITOR ELLIS: ---Subsection (a)(2)(b).

9 THE COURT: Go ahead.

10 SOLICITOR ELLIS: And it states, in pertinent part, the
11 videotaping at the breath site must include reading of the
12 Miranda rights, the entire breath test procedure, the person
13 being informed he is being videotaped, and he has a right to
14 refuse the test, which other requirements are laid out as
15 well.

16 Your Honor, the State would argue and proffer some
17 testimony in a moment that the videotape was begun at the
18 appropriate time in that all of these procedures were
19 captured on the videotape. As Mr. Johnston stated, the
20 audio is having a malfunction. But the videotape does work
21 properly, and it is possible to see the officer holding, for
22 instance, his Miranda rights card in his hand and speaking
23 to the defendant. It's possible to see that he's also
24 reading the implied consent form. It's in front of his face
25 and looking down at it and speaking and then handing a copy

1 of it to the defendant.

2 All these things are visible on the tape, Your Honor.
3 The officer obviously who, who gave the test is here and
4 able to testify as to what he did on that particular day as
5 far as offering the test and the procedures he went through.

6 Your Honor, the, the defendant was obviously given a
7 copy of the implied content rights form. I believe he
8 signed for it and then had it with him throughout the test,
9 and, therefore, the State would argue, obviously argue that
10 the point of the videotaping procedure is to make sure the
11 officer complies with the law and the defendant does make an
12 informed decision with regard to his decision to either take
13 or not take the test, and the State would argue that he did
14 have that, that information available to him.

15 The State has further argument. But at this time, Your
16 Honor, it may be appropriate just to go ahead and proffer,
17 proffer testimony.

18 THE COURT: All right.

19 SOLICITOR ELLIS: Or do you want to just play the tape
20 first?

21 would that be easier or whatever?

22 MR. JOHNSTON: I would, I would---

23 THE COURT: It's your motion, Mr. Johnston.

24 MR. JOHNSTON: I would suggest that we play it first,
25 Your Honor.

1 THE COURT: Yes, sir.

2 MR. JOHNSTON: And if I could just tell you where this
3 video comes from. As the State, as the Court may know,
4 there is a central repository for this data down in Columbia
5 on the SLED website. And where this particular DVD came
6 from, I went to the website, downloaded it, and burned it
7 onto a DVD. I haven't made any changes to it or anything
8 like that.

9 THE COURT: Could you lower the screen for us,
10 Mr. Bailiff?

11 (Bailiff complies.)

12 THE COURT: Thank you, sir.

13 (Whereupon, the DVD was played for the Court at this
14 time.)

15 MR. JOHNSTON: Your Honor, with the Court's permission
16 and consent of Mr., Mr. Ellis, we're going to turn it off
17 now unless there's something else the Court wants to see.

18 THE COURT: No, that's fine.

19 MR. JOHNSTON: Your Honor, that's the defendant's
20 evidentiary showing on this matter. I would like to, at
21 this time, introduce, as a Court's Exhibit, the DVD that
22 contains the video you just watched.

23 THE COURT: Any objection, Mr. Ellis?

24 SOLICITOR ELLIS: No objection, Your Honor.

25 THE COURT: It will be received then as a Court's

1 Exhibit for purposes of this hearing.

2 (Whereupon, the DVD was marked as Court's Exhibit No. 1
3 for identification purposes only at this time.)

4 THE COURT: Anything further, Mr. Johnston, before I
5 allow the State to proceed?

6 MR. JOHNSTON: Not in the way of evidence, no, sir.

7 THE COURT: All right. Mr., Mr. Ellis, you may
8 proceed.

9 SOLICITOR ELLIS: Thank you, Your Honor.

10 As Mr. Johnston's already referenced briefly in his
11 opening remarks on this motion, under 56-5-2953 Subsection
12 B, it's permissible, and if there is some kind of problem
13 where the officer can not produce the videotapes required by
14 the section, basically what the section says, Your Honor, is
15 failure by the arresting officer to produce the videotapes
16 required by this section is not alone a ground for dismissal
17 to my charge made pursuant to Section 56-5-2930 or other
18 sections if the arresting officer submits a sworn affidavit
19 certifying the videotape equipment, at the time of arrest
20 for probable cause determination or breath test device, was
21 in an inoperable condition stating reasonable efforts had
22 been made to maintain the equipment in an operable condition
23 and certifying that there was no other operable breath test
24 facility available in the county, or in the alternative,
25 submits a sworn affidavit certifying that it was physically

1 impossible to produce the videotape because the person
2 needed emergency medical treatment or exigent circumstances
3 exist. That's basically the pertinent part of that statute,
4 Your Honor.

5 If I may, I'd like to hand up a copy of the affidavit
6 the officer has filled out. I believe Mr. Johnston has a
7 copy.

8 THE COURT: Any objection, Mr. Johnston?

9 MR. JOHNSTON: No, sir, Your Honor.

10 THE COURT: All right. Pass it up.

11 (Whereupon, two affidavits were marked as State's
12 Exhibit Nos. 1 and 2 for identification purposes only at
13 this time.)

14 SOLICITOR ELLIS: It's been premarked as State's
15 Exhibit No. 1 for identification.

16 THE COURT: Thank you.

17 SOLICITOR ELLIS: And essentially what the affidavit
18 says, Your Honor, is that there was an audio problem in the
19 breath test room of the subject's room in the breath test
20 facility, and that, that basically was, we believe, an
21 exigent circumstance that existed here, something that the
22 officer, was outside of his control. He could not have
23 known about it and did not know about it. And, and for that
24 reason, Your Honor, the officer was not aware of the problem
25 until after the test had concluded. Because he was not

1 aware of the problem, he could not of taken action to
2 prevent it.

3 Your Honor, if I may, at this time, it may also be
4 appropriate to go ahead and call Deputy Evett to the stand
5 to elicit testimony from him.

6 THE COURT: Come forward, sir, and be sworn.

7 DAVID EVETT, being first duly sworn,
8 testified as follows:

9 THE COURT: Have a seat in the witness stand please,
10 sir. Once seated, I'll ask that you state your name for the
11 record.

12 WITNESS: Deputy M. Evett.

13 THE COURT: Your witness, Mr. Ellis.

14 SOLICITOR ELLIS: Thank you, Your Honor.

15 DIRECT EXAMINATION

16 BY SOLICITOR ELLIS:

17 Q Deputy Evett, where are you employed?

18 A At the Spartanburg County Sheriff's Office, sir.

19 Q And how long have you worked there?

20 A About three, about three and a half years now.

21 Q All right. During that time, what have been some of
22 your duties or functions?

23 A I work on uniform patrol.

24 Q Are you a certified Data Master operator?

25 A Yes, sir.

1 Q And by whom are you certified?

2 A By the South Carolina Law Enforcement Academy and
3 Department of Public Safety.

4 Q Department of Public Safety also?

5 A Yes, sir.

6 Q How long have you been certified?

7 A Take out my card here, sir. I was certified on
8 January 25th of 2007.

9 Q And so then you were also certified on September
10 13th, 2007, is that correct?

11 A Yes.

12 Q And you're still certified today?

13 A I am, sir.

14 Q All right. And did you offer a Data Master test to the
15 defendant, Phillip Wesley Sawyer, on September 13th, 2007?

16 A Yes, sir, I did.

17 Q And basically why did you do that?

18 How did you come about getting into this case?

19 A I responded to Lieutenant Woodward's traffic stop in
20 reference to transport and to run the Data Master.

21 Q And once you -- so, you transported the defendant to
22 the jail then, is that right?

23 A Yes, sir, I did.

24 Q Once you arrived with him at the jail, where, where do
25 you place him?

1 A Into the subject test area of the Data Master.

2 Q And that would be the, the larger room that we can see
3 primarily on the video that was watched a moment ago?

4 A Yes, sir.

5 Q Once, once he was in there, what did you do next?

6 A I retrieved my, the forms I needed and I went into the
7 room and read Mr. Sawyer his Miranda rights and his implied
8 consent.

9 Q Now, where did you have to go to get the forms you
10 needed?

11 A Into the other, the, the breath sample, where the
12 breath sample machine is.

13 Q The room where the Data Master is located, sir?

14 A Yes. Yes, sir.

15 Q And is it correct, well, Mr. Johnston has mentioned
16 this already, but is it correct that there is a, basically a
17 counter that the Data Master sits and there's a glass pane
18 with a small hole in it that separates the room where the
19 Data Master is from the room with the defendant?

20 A That's correct, sir.

21 Q So, you went in the room with the Data Master, got the
22 form, and went back to the defendant?

23 A Yes, sir.

24 Q While you were in the room with the Data Master getting
25 the forms, did you also activate the video and audio

1 equipment at that time?

2 A I did.

3 Q Did you check to see if it appeared to be operating?

4 A I did.

5 Q And did it appear to be operating to you?

6 A It appeared to be operating to me, yes, sir.

7 Q How could you tell that?

8 A The -- it pops up on the -- after you press the, the
9 red button, it pops up on the, the computer screen.

10 Q There's actually a---

11 A And, and it says record.

12 Q It says, it says recording?

13 A Yes.

14 Q And you say you can see the actual visual image put out
15 by the camera?

16 A Yes, sir, I can see the visual image of the subject
17 test area and the room that I'm in.

18 Q Was there anything, back on September 13th, 2007, to
19 indicate to you whether the audio was on or off?

20 A No, sir.

21 Q So, there's, there's no way, as far as you could tell,
22 to tell---

23 MR. JOHNSTON: Your Honor, object to leading the
24 witness.

25 THE COURT: Well, we're in, we're in a pretrial hearing

1 and this is not a jury setting. I would ask that you not
2 testify or suggest answers to the witness. To that extent
3 I'll sustain the objection, but some leading will be allowed
4 in this situation.

5 You may proceed.

6 SOLICITOR ELLIS: Thank you, Your Honor.

7 Q So, there -- was there anything at all that you could
8 tell if the audio was working or not?

9 A Sir, as far as I could tell everything was working
10 properly.

11 Q All right. And at that point did you walk around the
12 room with the defendant?

13 A Yes, sir.

14 Q Once you entered the room with the defendant, what did
15 you do?

16 A I read the defendant his Miranda rights and the implied
17 consent, which he signed, I signed, and he signed.

18 Q Did you also tell him he was being videotaped?

19 A I did. That's one of the first things, first lines on
20 the implied consent. I followed it word-for-word all the
21 way down.

22 SOLICITOR ELLIS: Approach the witness, Your Honor?

23 THE COURT: You may.

24 Q Deputy Evett, I'm showing you a form that's marked
25 advisement of implied consent rights.

1 Is that familiar to you?

2 A Yes, sir, it is.

3 Q And is that the form you used that night?

4 A It is.

5 Q Did you read, you read that form to the defendant and
6 give him a copy?

7 A I did. After he signed it I give him a copy.

8 Q And is there any writing at the top of that form
9 beyond, below the advisement of implied consent rights
10 heading?

11 A Yes, under, under A, it says will test be video
12 recorded. If answer is yes, start here. Inform subject of
13 video recording. I informed subject of the video recording.
14 Advised subject of Miranda rights. I pulled my Miranda
15 rights card out of my pocket and read him his Miranda rights
16 and asked if he understood.

17 Q And when you enter a room with the defendant or you're
18 advising the defendant of his implied consent rights, do you
19 follow that form?

20 A I do.

21 Q And---

22 A From the top.

23 Q And basically how do you go about following it?

24 A I follow it, like, as I said, word-for-word on, on the
25 form here. As I just explained under A, I informed subject

1 of video recording, advised subject of Miranda rights, and I
2 informed -- well, that's under no. All my answers were yes.
3 Then I go to Subsection B where it says then read following
4 advisement to subject. Then I read the following advisement
5 verbatim all the way through to the end.

6 Q All right. So, you advised him he was being videotaped
7 at the beginning?

8 A I did, sir.

9 Q And then, moving on to the next bullet point, where it
10 says advisement of Miranda rights.

11 A I did, sir.

12 Q At some point on the video early on it's possible to
13 see you reach into your pocket and pull out a card or a set
14 of cards.

15 Do you recall that?

16 A Yes, sir.

17 Q What was that?

18 A That's, that's my set of cards I keep in my pocket
19 whenever my uniform's on my body, and inside there I have my
20 Data Master card and my Miranda rights card.

21 Q And did you mind -- would you mind just reading the
22 Miranda rights you have on your card?

23 A You have the right to remain silent, to refuse to
24 answer questions. Anything you say may be used against you
25 in a Court of law. You have the right to an attorney, to

1 have an attorney present during questioning. If you can not
2 afford an attorney, one will be appointed for you without
3 cost. If you decide to answer questions now, you will still
4 have the right to stop answering at anytime. Do you
5 understand.

6 Q Is that the way you read them to this defendant that
7 night?

8 A Yes, sir, verbatim.

9 Q Did he indicate that he understood it?

10 A He did.

11 Q Did you see anything on the video that would
12 demonstrate that he understood?

13 A Yes, sir.

14 Q What?

15 A I did, on the video, after I finished reading the card,
16 and the last, number six on my card says do you understand,
17 and I said do you understand, and in the video he was
18 shaking his head.

19 Q Shaking his head---

20 A Shaking his head like up and down motion I guess saying
21 yes.

22 Q In other words, he was nodding?

23 A Yes, sir.

24 Q Basically an affirmative understanding?

25 A Yes, sir.

1 Q All right. At that point, what did you do after he
2 finished reading the Miranda rights and he indicated he
3 understood those?

4 A I read him the advisement of implied consent rights.

5 Q And would that be exactly as printed on the, on the
6 form there?

7 A Yes, sir, exactly as printed on the advisement of
8 consent rights form.

9 Q Just for the record, would you mind just reading that
10 please?

11 MR. JOHNSTON: Your Honor, we'll stipulate he read that
12 for purposes of---

13 THE COURT: I understand.

14 MR. JOHNSTON: We'll stipulate he read it. We won't
15 stipulate it was recorded on the videotape.

16 THE COURT: I understand.

17 SOLICITOR ELLIS: All right.

18 THE COURT: I'll accept the stipulation.

19 Q And after you read the implied consent rights form to
20 the defendant, you went through that, that section of his
21 rights and whether he refused or take the test, or to take
22 the test, did he indicate he understood that also?

23 A He did, sir.

24 Q And how did he do that?

25 A By nod -- well, verbally to me and nodding.

1 Q Nodding again also?

2 A In an affirmative manner, yes, sir.

3 Q All right. Did you provide him a copy of this form?

4 A I did. I signed it and then I provided it for
5 Mr. Sawyer to sign. He signed it and then I checked the
6 pages to make sure the signature went through and provided
7 him with a copy.

8 Q And once you give him a copy, what did you do?

9 A I left the B.A. room to go back around to the other.

10 Q Once back in the other room, did you check his mouth or
11 anything in his mouth?

12 A I, I did. I did. It shows on the, on the video where
13 I checked his, I checked his mouth, started the, the twenty
14 minute waiting period and fed the ticket through the
15 machine.

16 Q Okay.

17 A The B.A. machine.

18 Q Was there anything in his mouth?

19 A No, sir, not that I could ascertain.

20 Q Did you observe the twenty minute waiting period before
21 you offered him the test?

22 A I did.

23 Q And did the machine pass the self-checks at the end of
24 the tape and before you offered the test to him?

25 A It did.

1 Q By, by your understanding, was the machine operating
2 properly when you offered him the test?

3 A Yes, sir, to my understanding the machine was operating
4 proper.

5 Q And once again, was there anyway, any indication to you
6 whatsoever that the audio portion in the room where the,
7 where the defendant was was not working?

8 A There's no indication to me whatsoever from where I was
9 at.

10 Q Thank you. Please answer any questions Mr. Johnston
11 may have.

12 THE COURT: Mr. Johnston, your witness.

13 MR. JOHNSTON: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. JOHNSTON:

16 Q Were you the arresting officer in this case?

17 A No, sir, I was not.

18 Q Tell me what you know about that set-up in terms of
19 their being, whether or not there's a microphone in the
20 subject room.

21 Is there a microphone in the subject room?

22 A I -- as far as I know there, there is. But I don't
23 know where it's at, sir. I know that there's suppose to be
24 audio in both rooms.

25 Q Yes.

1 And you'll agree with me that the presentation that we
2 had here today is not the way it was designed to work, am I
3 correct?

4 A You're correct, to my knowledge.

5 Q In fact, when you entered the room where the subject
6 is, where Mr. Sawyer is, we should have been able to hear
7 you just as clearly as we heard you in the room with the
8 Data Master machine?

9 A That's correct, sir.

10 Q However, we did not hear you read the Miranda rights to
11 Mr. Sawyer, did we?

12 A No, sir, you did not.

13 Q We did not hear you on the recording informing
14 Mr. Sawyer that he was being videotaped?

15 A No, sir, you did not hear me.

16 Q And we did not have on the recording the fact that you
17 told Mr. Sawyer he had a right to refuse the test, am I
18 correct?

19 A That's correct, sir.

20 Q Did you specifically check the microphone in either
21 room to see if they were working?

22 A No, sir, I did not.

23 Q Have you been instructed how to do that?

24 A I have not been instructed how to check the microphones
25 in the rooms, no, sir.

1 Q So, you would of had no way of knowing whether or not
2 either of the microphones was working, am I correct?

3 A That is correct, sir.

4 Q Have you heard or had you heard, at the time of the
5 administration of this test, that would be back in September
6 of 2007, had you heard that there might be a problem with
7 the audio portion of the Data Master tests?

8 A Had I heard that there might of been?

9 Q Yes.

10 A No, sir.

11 Q All right. Since that time, other than in this case,
12 have you heard that there might be a problem with the, the
13 audio recording aspect of the Data Master equipment?

14 A No, sir, I have not heard, no.

15 Q All right. You did look at the tape in this case, did
16 you not?

17 A Yes, sir.

18 Q Have you done that before today?

19 A No, sir.

20 Q Did you do it today when you---

21 A Yes, sir.

22 Q ---saw it here today?

23 A No, I saw it previously coming into the courtroom.

24 Q All right. Was that yesterday?

25 A I was in, I was informed that the audio was not working

1 prior to today.

2 Q Yes.

3 A But I did not see the tape.

4 Q Okay. Did you report this to the State Law Enforcement
5 Division that there was a problem?

6 A No, sir, I did not.

7 Q To your knowledge, has anyone with law enforcement or
8 the prosecution informed the State Law Enforcement Division
9 of this problem?

10 A To my knowledge, no.

11 Q Have you checked any of the maintenance records or logs
12 of, for any of the Data Master devices or the video systems
13 that they are equipped with to see if this problem has been
14 reported?

15 A No, sir, I have not.

16 Q You make a number of DUI cases, do you not?

17 A Not, not a large number. But a few here and there.

18 Q All right. And you do give breath tests from time to
19 time?

20 A Yes, sir, I do.

21 Q Do you -- have you looked at all of your breath tests
22 that you've made in the last six or eight months to see if
23 the audio worked?

24 A I look, I look at them before or prior to coming to
25 Court and so far I haven't had a problem with any of my, the

1 recordings that I've checked as far as the audio.

2 Q But you haven't checked all of the ones that you've
3 done in the last six or eight months, have you?

4 A No, sir.

5 Q For all you know, they're all like this?

6 They could be?

7 A They could be, you're right, sir.

8 Q All right. Do you know whether or not these
9 microphones have an on and off button?

10 A I do not know that, sir.

11 Q Is it possible that they have an on and off button?

12 A To my knowledge, no, there's a big red button in the,
13 in the room. You press that and it starts recording
14 hopefully.

15 Q All right. There are other Data Masters available at
16 the Spartanburg County Jail where this test was offered to
17 Mr. Sawyer, am I correct?

18 A You are correct, sir.

19 Q How many other ones do they have up there?

20 A There are three. A total, a total of three.

21 Q This one and two others?

22 A Two other, yes, sir.

23 Q So, we could -- you could have used one of the other
24 two machines, couldn't you, if you thought there was a
25 problem?

1 A Oh, yes, sir, if I thought there was problem I would of
2 used that, that, that room and that machine.

3 Q The other thing is you could of brought the subject,
4 the defendant, Mr. Sawyer, into the room with a Data Master
5 machine and given him rights in there?

6 A I could have. It's not a preferred method. The
7 preferred mother is to put the subject in the subject test
8 room.

9 Q Well, you are aware that other law enforcement agencies
10 only have one room?

11 A I'm aware of that, yes, sir.

12 MR. JOHNSTON: All right. Beg the Court's indulgence
13 one moment?

14 THE COURT: Yes, sir.

15 (Pause.)

16 MR. JOHNSTON: Please answer other questions.

17 THE COURT: Mr. Ellis.

18 SOLICITOR ELLIS: Thank you, Your Honor.

19 REDIRECT EXAMINATION

20 BY SOLICITOR ELLIS:

21 Q You said earlier that there was no indication to you
22 that there was a problem with the audio, is that right?

23 A That's correct. There's no indication to me
24 whatsoever.

25 Q Would that be why you did not try to move to a

1 different machine?

2 A Yes, sir, had, had I known that there was a problem
3 with either the machine, the audio, if there had been a sign
4 on the door, you know, any, any indication that everything
5 wasn't working properly, I would not have used that machine
6 in that room.

7 Q In, in reviewing your case or all of the other cases
8 that you've used tapes for in the past, have you ever
9 noticed a problem with the audio in the Data Master room?

10 A I have not. I have not had a problem in the past.

11 Q This is the first time this has ever happened to you?

12 A Yes, sir.

13 SOLICITOR ELLIS: I have nothing further, Your Honor.

14 THE COURT: Anything further, Mr. Johnston?

15 MR. JOHNSTON: No, sir.

16 THE COURT: You may step down.

17 You may call your next witness, Mr. Ellis.

18 SOLICITOR ELLIS: Thank you, Your Honor.

19 The State would call Agent Brett Baker.

20 THE COURT: Come forward, sir, and be sworn.

21 BRETT BAKER, being first duly
22 sworn, testified as follows:

23 THE COURT: Have a seat in the witness stand please.

24 Once seated, if you would, please state your name into the
25 microphone for the record.

1 WITNESS: My name is Donald Brett Baker. It's
2 B-A-K-E-R.

3 THE COURT: Mr. Ellis, your witness.

4 SOLICITOR ELLIS: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY SOLICITOR ELLIS:

7 Q Agent Baker, where are you employed?

8 A I'm employed at the South Carolina Law Enforcement
9 Division commonly known by the acronym SLED.

10 Q And in what capacity are you employed at SLED?

11 A I'm employed in the, what's referred to as the implied
12 consent program. That's the program that regulates breath
13 alcohol testing and video recording of those tests for the
14 State of South Carolina. That is that we promulgate all the
15 rules and regulations, approve training curriculums for the
16 South Carolina Criminal Justice Academy, that is what
17 officers will be trained with proven, the authority that
18 approves training.

19 Again, we regulate all aspects of the breath alcohol
20 testing as well as recording devices for the State of South
21 Carolina.

22 Q What are some of your, what are some of your specific
23 jobs or functions be with that implied consent unit?

24 A Well, to try to comply with the statute that we are
25 required with doing inspections of each breath alcohol

1 testing device. We generally do those once every quarter or
2 every 12 weeks. We're also, by statute, once a year and
3 generally when we go out and inspect the breath alcohol
4 testing device, we also try to inspect the video recording
5 device.

6 So, we do routine inspections as well as, as well as
7 doing any maintenance on the breath alcohol testing devices.
8 If we find problems with video devices, we, we are trained
9 to do some repairs. But we contract with an outside entity.
10 That's the W.H. Platts Company, which is out of Charleston
11 as well as Charlotte, North Carolina, to do maintenance on
12 the video systems.

13 So, my daily job is to, you know, administer the
14 program. It's to do maintenance, oversight, repair, correct
15 or fix any potential problems or actual problems.

16 Q And how long have you worked at SLED?

17 A I was hired at SLED January 1st, 1992, as early
18 inception of the Data Master program. I was hired to help
19 implement that program. I spent currently, I believe it was
20 three and a half, four years in that position. Spent the
21 next seven and a half years working crime scenes. That's
22 latent print crime scene evidence. Then I spent a short
23 time doing arson investigations here in the Upstate and I've
24 been back in the implied consent program for the last four
25 or five years. Some 15 years total I believe, a little over

1 15 years.

2 Q All right. So then you were working with, I don't
3 know, with SLED also with the implied consent program not
4 only now but also on September 13th, 2007?

5 A That is correct, yes.

6 Q Have you had a chance, excuse me, to review the
7 videotape and the records concerning this test offered to
8 this defendant?

9 A Yes, sir, at your request, you called SLED indicating
10 to me that there was a, that there was an audio problem with
11 this video for this case. I did review this, this video
12 that day with you on the phone as well as prior to coming
13 into court. I reviewed all records as it pertains to the
14 breath testing device as well as the actual recording
15 device.

16 Q And from your review, basically, basically can you tell
17 the court what happened, what the problem was with this
18 particular test or this video?

19 A To be honest with you, we're not quite sure what the
20 problem was. It lost audio in the subject portion of the
21 testing facility. There is, if you, if you look on the
22 video, right on the other side of the round hole, there's --
23 you can see a microphone. It's actually in place on the
24 subject's testing side. The video, of course, was working,
25 but there was no audio.

1 Contacted our supplier, our vendor, that is, that does
2 the maintenance. There was never a corrective action done
3 to get it back working. Quite frankly, did not know it
4 wasn't working until you called me in reference to this
5 case. I did a short review of cases surrounding this time.
6 There's approximately a four month period it comes and goes.
7 It wasn't working and there was no indication that the
8 officer would of had that it wasn't working either at the
9 time when he conducted the test.

10 This system's designed for one button, button press.
11 That is that you press one button. The audio, as well as
12 the video portion, will cut on. It will say video
13 recording. There is an audio meter below the picture that
14 will move if sound is picked up. At this time, I believe
15 that portion of the, the video, the audio portion, was cut
16 off from the instruments. We're talking roughly a year
17 after implementation from VHS tapes to the new digital
18 system.

19 And the reason for that conversion is VHS technology is
20 obsolete. We couldn't get, we couldn't get it. We
21 couldn't, we couldn't comply with the law if we didn't move
22 technology forward. So, we went to the next step and that
23 was digital recording, and it's a windows -- it's a windows
24 media video, WMV format, and that was for easy uploading and
25 downloading the size of the video.

1 But again, when we first implemented it roughly a year
2 prior to this test we were having some recording issues.
3 That is that you'd look at some dirty videos of persons. It
4 looks like they're starting to move and they stop, and the,
5 and the video were jerky, the capture rate.

6 We determined, through the company that we contracted
7 with, that we believe the audio portion was causing some
8 conflicts. So, they cut the meters off as a test. So,
9 we're still in its infancy. But the meters were off that
10 are on today. A person going into a room can cut, press the
11 red button. If they see themselves as well as the subject,
12 and they see the odd, the meters moving, that is it's a
13 little red bar, yellow red bar moving up and down, if
14 someone speaks or touches the, the mics, you will see, as
15 it's recording to the file, you will see it move.

16 So, there is some indication today, you know. Whether
17 all operators were trained in that the early days they were
18 not. You know, you switch over to a new system. They were
19 trained hey, you press the red button, it should be
20 recording, it should be capturing the audio, and, quite
21 frankly, with the old system, with VHS, the officer never
22 went back and reviewed his tape within a short period after
23 doing the recording and there's no way to look at it the
24 night of.

25 So, the next day or after the test we wouldn't know if

1 there was an audio problem with the old system. And I
2 don't -- quite frankly, we rely on officers to try to call
3 us and let us know. We can look from SLED to see if they're
4 problems. But we're not always able to -- there's 163,
5 roughly 163 devices statewide, 15,000 tests. We can't look
6 at every one of them. So, yes, there was a problem. It was
7 unfortunate. Other than that, I have no idea what to say.

8 Q All right. And you said, at this point, there is a
9 little meter I guess on the, on the video screen that shows
10 the audio was on or off.

11 But at that time that, that meter was deactivated by
12 SLED, is that right?

13 A That's correct. Around this time of the test there
14 were no meters activated. That's roughly been done within
15 the last three months, the reactivation of those meters.
16 And that was due to another more important problem, not
17 actually catching video. So, you know, most of them are
18 catching -- video are operable. You know, you're getting
19 video as well as audible sound, sound. This one, again, not
20 sure why it didn't happen, why it happened. But it, it
21 happened.

22 Q And, and, again, also you said that this officer or
23 other officers as well would not have been trained to look
24 for the audio bar---

25 A No, sir.

1 Q ---at that time?

2 A At the time they were not trained to look for the audio
3 meters. Again, that was to put a visual clue. If you see
4 it, you can assume that there's something being written. In
5 other words, as it moves, you know you're picking up some
6 sound and it's being written to the file.

7 I mean, quite frankly, if it was a bad hum in the room,
8 it could pick up a hum. They would just know -- they
9 wouldn't know it was a hum. There is no way to play it back
10 in the room as it's, as it's recording. You can't record it
11 and play it back so that they would know cause the, the type
12 of electronics you get feedback. It's just not possible.

13 Q And as you said, at the time, I believe it was a one, a
14 one button push operation for the Data Master or the
15 recording device rather, is that correct?

16 A That is correct. It is still that way today. There's
17 one button that presses that activates the recording as well
18 as the audio. There's no way that the operator can elect to
19 cut off or on the audio. When they press that button and it
20 comes up and says recording, audio should be recording.

21 Q So, would it be fair to say then if an officer pushed
22 that button, saw the video come up on his screen that's next
23 to the Data Master and was recording in both rooms, at that
24 point he can assume that everything is working as it should?

25 A Yes, sir, that -- he would have assumed that -- I'm --

1 he would have been trained no differently to my knowledge.

2 He would have assumed that everything was working properly.

3 He would assume that he was getting video as well as audio.

4 Q Again, you said that there's never a call regarding the
5 audio being out in that room for any test during that time
6 frame or was in and out?

7 A That's correct. There was nothing documented by SLED.
8 However, that's not really necessary per statute. But we
9 try to document video recording problems at the breath
10 testing site. I, I never knew there was a problem till you
11 called me with this case.

12 Q How, how long does it take for a video that is being,
13 as recorded by an officer or a deputy, how long does it take
14 for that video to upload to the SLED site?

15 A What we've tried to train as officers is, is, again,
16 for about every minute of recording time, it's about two
17 megabits of a file size. It's -- most -- so most files,
18 about 43 minutes is about, you know, 86 minutes or 86
19 megabits size file. We train officers hey, because of been,
20 upload times, we're relying on their, their sites, Band web
21 and Internet connections, the type of connections, we train
22 to, them to please wait three days, try to wait three days
23 before trying to access your video off of our server.

24 Q And how, how many times a week does SLED upload videos?

25 A No, it's, it's done at the conclusion of every test.

1 when they cut off the video, it automatically tries to
2 upload. But when you have 15,000 of them coming into one
3 place over a year, you know, some being down, you know, Band
4 web basically is the pipeline, the amount of data we can
5 take it at one time, it can take quite a while to upload
6 from a testing site to SLED, the host site. So, we ask that
7 they give it three days.

8 They don't always do that. Sometimes they'll call me
9 that night of. Just got through and can't access it because
10 it's not uploaded. But generally within three days they've
11 uploaded.

12 Q All right. So, he could not have accessed it that
13 night, the video that night, to check either one?

14 A There, there would of been no way to access it that
15 night.

16 Q Did -- during -- you mentioned earlier that there was
17 a, a period of, a couple of months at least where there was
18 audio you said was in and out.

19 Was it -- was that fair to say then that audio didn't
20 work properly for some test during that period---

21 A Yes, sir.

22 Q ---or it did not work properly for parts of all those
23 tests during that period?

24 A The best that I can tell during that time frame, and
25 it's probably a four month time frame, and Spartanburg

1 running a fair number of tests up here, not all persons
2 speak on the subject side. Many times it's just the officer
3 talking from his side of the, the partition and the subject
4 on his side and many times it's hard to tell whether or not
5 you're getting audio because if they stand close enough to
6 the window, as he did early in this video or after the
7 advisement, you could hear his speech. So, it's hard to
8 tell. But it appeared that it had come and gone several
9 times. But it was not working properly as it should have
10 for I know at least three to four months.

11 Q But after that three or four month period, it began to
12 work properly even without corrective action?

13 A Without corrective action that I can find, that's
14 correct.

15 Q All right. Again, the officer could not have known
16 about the problem?

17 A He would not have known. There would of been no visual
18 clues for him that night during the test, no.

19 Q Could he have done anything to turn the audio off
20 himself?

21 A No, sir.

22 Q Could he have corrected it there by himself?

23 A No. No, sir. If he would of known that there was some
24 problem, he would of called me, I would of advised him to go
25 to another site. But there's no way he would of known that

1 there was a problem that night.

2 Q Essentially cause it's beyond his knowledge and beyond
3 his control?

4 A That's correct.

5 Q Please answer any questions Mr. Johnston may have.

6 THE COURT: Mr. Johnston, your witness.

7 CROSS-EXAMINATION

8 BY MR. JOHNSTON:

9 Q How often y'all check these things?

10 How often do y'all check these things?

11 A By statute, we have to once a year, on-site
12 inspections. But we, we try to go out when we do a, when we
13 do a breath instrument inspection, which is once about every
14 12 weeks. We, we generally try to activate the systems at
15 that point in time also to see if they're working.

16 Q Okay. Is it fair to say that you-all have never found
17 any problems with it or you have been unable to find any
18 problems with it?

19 A Problems with what?

20 I'm sorry.

21 Q With the audio recording devices.

22 A No, sir, I'd say that was incorrect. There --
23 apparently there was a problem found for, for this test and
24 this purpose. There is a problem.

25 Q Well, have y'all documented that on the SLED website

1 about this problem?

2 A No, sir.

3 Q Okay.

4 A I've not from even Mr., Mr. Ellis had contacted me.

5 The video documentation by statute, to my understanding by

6 statute, is not required. It's a problems with the breath

7 test instrument for needing to be documented. However, we

8 do try to document problems and we would, if an officer was

9 to call us and complain in the field, hey, I'm having a

10 problem, can't activate a video, we try to document those.

11 But we do document problems with breath testing devices.

12 Q Since you have learned of this problem, have you

13 conducted a full inspection of this particular system that

14 is involved here?

15 A Yes, sir.

16 Q You have.

17 And what were the results?

18 A It's working today.

19 Q Working today?

20 A And it was working roughly a, I don't know, four or

21 five days ago when Mr. Ellis contacted me in reference to

22 this case. I don't remember exact number of days. But it's

23 been some numbers.

24 Q Certainly you haven't looked at every video that's been

25 done for the months preceding Mr. Sawyer's case back in

1 September of 2007 and the months following?

2 A I looked at roughly I want to say it was four months.
3 And again, I don't remember the exact number. About four
4 months worth of cases or number of tests to try to see when
5 the audio went out and when it came back in.

6 Q Did you look at every one of them?

7 A Just about every one of them, yes, sir.

8 Q Just about?

9 A There's time, there's time, you know, I -- if I looked
10 on the 14th and it's not working, I jumped to the 18th.
11 And if it's not working, I jumped to the 21st and all
12 right, it's all of a sudden working, I back up and look at
13 the 19th and in-between. It is almost impractical for us
14 to look at every one of the tests.

15 But when I was notified of this problem, because of the
16 nature of the problem, and my curiosity as well as the type
17 of test it could affect, I went back and tried to research
18 Mr. Ellis' concerns with the audio portion having dropped
19 off on this video. So, I did go back and look through just
20 about every one for about a four month period.

21 Q All right. Have you looked at the ones in the last
22 three months?

23 A Yes, because it was working here -- again, I, I don't
24 remember the exact number and I don't want to sound -- I
25 don't want to be misleading. For about four months it

1 wasn't working, then it started working. As of today it was
2 working. I talked with the persons that we contract within
3 reference to the problem to see if it was ever reported
4 and/or documented, a corrective action that got it working.
5 There was no indication they had or we had that it was ever
6 corrected. It was an intermittent problem much like this
7 one is fading in and out of the moment.

8 Q All right. Of course, this one is, isn't fading out
9 for your entire testimony, is it?

10 A No, sir, but it's -- again, it's possible.

11 Q Now, does the microphone up at the Data Master room,
12 does it work similar to this one in this way if I tap the
13 end it makes a noise and---

14 A No, sir.

15 Q It doesn't work like that?

16 A No, sir, there's no, there's no audible---

17 Q No.

18 You can't tell it?

19 Doesn't it---

20 A No, there's, there's no way, due to feedback reasons,
21 you can not tap on that microphone and hear it in the B.A.
22 room. When they press that one button system, they're
23 trained if you can see your subject, we try to train them
24 the best we can to comply with law, can you see yourself as
25 well as the subject and their actions on the video for the

1 entire breath test procedure. So, if you see yourself,
2 you're getting video and you should be getting audio also.

3 Q You should be?

4 A We got audio meters on there today.

5 Q Correct.

6 A Again, they were disabled around this time frame in
7 order to correct a video problem, a capture problem they
8 believed, the manufacturer believed was, was creating a
9 problem. There's, you know, and visual clues today, they
10 look and see audio. They can be assured that some sound is
11 being recorded. If there was a loud hum, brrrrrr (phonetic)
12 overtaking their voice, they wouldn't know that the loud hum
13 wasn't being recorded over their voice.

14 So, that -- we do have a visual clue to try to help
15 them understand yes, we get audio. Yes, we've got video.
16 You can proceed with the test. But quite frankly, for the
17 number of years prior to since the enactment of the breath
18 test, video requirements under law, with the VHS tape
19 players, there was no way to know whether or not you were
20 getting accurate video and audio there.

21 Today, with the new system, there is possibilities that
22 we go in and we try to, I do myself on a regular basis, and
23 view to try to find problems prior to them, him being
24 recorded. But again, this case was never reported to us.

25 Q So, the system that you have in place now that was

1 disabled at the time of Mr. Sawyer's test would have given
2 some indication to the operator that the audio was working
3 or not working?

4 Am I correct?

5 A would you state that one more time?

6 Q Is, is it correct to say that, at the time of Mr.
7 Sawyer's test, that the system you have in place now to help
8 the Data Master operator know if the microphone's working
9 was disabled?

10 A Yes and no. The system today, the, the microphones,
11 and just to be perfectly clear, there is a meter level to
12 let them know hey, there is some sound that's being recorded
13 that it's on today. It wasn't on then. However, the
14 officers have not been trained to look for that.

15 So, whether or not he had had the knowledge to know, at
16 that time, that it wasn't recording or today it wasn't
17 recording, I'm, I could not testify to it.

18 Q If the system were enabled at that time and the officer
19 had been trained in its use, it would have given him some
20 assurance that the audio was working?

21 A Yes and no because you -- it would give him some
22 indications it's picking it up. Not that it was necessarily
23 writing it to the file. We changed that whole program.
24 Today, if you see an audio, you can be sure it's writing
25 some sound to the file. So, there has been some minor,

1 minor modifications in this system.

2 But yes, if it would of been enacted and it would of
3 been viewable, if that would of been possible, which it
4 wasn't, there may have been some visual clue if he had had
5 the knowledge, that's a big if, if he had the knowledge to
6 look at it.

7 Q And if there was a problem, he could have gone to
8 another unit?

9 A If he'd of had the knowledge there was a problem, we
10 train them to go to another unit, correct.

11 Q Please answer any other questions.

12 THE COURT: Mr. Ellis.

13 SOLICITOR ELLIS: Just briefly, Your Honor.

14 REDIRECT EXAMINATION

15 BY SOLICITOR ELLIS:

16 Q Approximately how often do you check individual Data
17 Master units in, in the Spartanburg County Jail for
18 problems?

19 A The Data Masters themself?

20 Q Well, I should ask for the Data Masters or videotaping
21 devices.

22 A The videotaping devices generally are checked every
23 time that there's a Data Master or breath testing device
24 instrument checked. So, about every 12 weeks we'll
25 generally, we'll press a red button like the operator will,

1 do we see video coming up. Now you look to see if there's
2 an audio meter. Does it look like it's recording sound.
3 Yes, let's move on.

4 The more accurate way is to go back and look at what
5 was actually written to the file. I try to do that on a
6 weekly basis. But again, I don't, I'm not able to do that
7 to 165, 163 sites, 15,000 tests.

8 Q So, in other words, you do check the individual files
9 or videos I suppose from the website about, about weekly, is
10 that right?

11 A Oh, absolutely. But more then, you know, several times
12 a week. Just about every time I'm in the office I'm looking
13 at some video to, to verify, especially when you get to
14 Spartanburg/Greenville, other sites that are what I consider
15 high volume sites, to make sure that, you know, looks like
16 everything -- because again, we don't have -- we try to rely
17 on the operators. You know, hey, go out there after you run
18 your test, wait the three days, download it. If you see
19 there's a problem, contact us.

20 But again, you can train someone to do something and
21 they don't do it. So, we try to go back and look over
22 videos to try to catch problems with prior to them being
23 reported or relying on somebody else's. Try to be a little
24 more proactive.

25 Q And that is done regularly?

1 A Yes, sir, it is.

2 Q Thank you.

3 THE COURT: Anything further?

4 MR. JOHNSTON: No, sir.

5 THE COURT: You may step down.

6 WITNESS: Thank you, Your Honor.

7 THE COURT: Yes, sir.

8 Mr. Ellis, anything further from the State?

9 MR. JOHNSTON: Your Honor, that's all the testimony the
10 State would proffer. At this time we have some case law I
11 would like to hand to the Court if that's appropriate at
12 this time.

13 THE COURT: Yes, sir.

14 SOLICITOR ELLIS: Your Honor, the first case I would
15 like to present is State v. Landis. This basically concerns
16 the affidavit I've already handed up to the Court concerning
17 the problem with the audio.

18 May I, may I approach?

19 THE COURT: Yes, you may.

20 SOLICITOR ELLIS: Your Honor, this, this case
21 essentially speaks to two issues. I'm primarily concerned
22 with the second. This case is State v. Landis. It's a
23 Court of Appeals case. Citation 362 South Carolina 97
24 decided December 6th, 2004.

25 And essentially, Your Honor, I'm looking at, again, on

1 Page 3 of the hand-out, which is Subsection, Roman Numeral
2 II of the case, under videotape requirements. Basically
3 what happened, Your Honor, in the case was two officers made
4 a stop of a defendant at the roadside. The arresting
5 officer was deemed to be a trooper from the Highway Patrol
6 in this case. He did not have a, a video camera or did not
7 get a good videotape from his in car camera at least at the
8 roadside. And basically the Court analyzed Section
9 56-5-2953(a), and noted that, of course, a person charged
10 with driving under the influence shall have his conduct at
11 the incident site and the breath test site videotaped, and
12 went through to explain at what points those tests, those
13 tapes rather should begin and end.

14 And it also cited Section 56-5-2953(b) and it stated at
15 the bottom, the left-hand column, Your Honor, says while
16 Trooper Davis was unable to videotape the arrest due to the
17 inoperable condition of his videotape equipment, Section
18 56-5-2953(b) clearly envisioned instances where a videotape
19 might not be available at the incident site, and it
20 provides, and it quotes the section, nothing in this section
21 may be construed as prohibiting the introduction of other
22 evidence in the trial or violation of Section, Section
23 56-5-2930 failure by the arresting officer to produce the
24 videotapes required by this section is not grounds for
25 dismissal on the charge and pursuant to Section 56-5-2930 if

1 the arresting officer submits a sworn affidavit certifying
2 that the videotape equipment at the time of the arrest or
3 probable cause to determination for the breath test advice
4 was in an inoperable condition and the reason whatever
5 happened to maintain, maintain the equipment in an operable
6 condition. And they found that there was no other operable
7 breath test facility available in the county or, in the
8 alternative, submits a sworn affidavit certifying it was
9 physically impossible to produce a videotape because the
10 person needed emergency medical treatment or exigent
11 circumstances existed.

12 And, Your Honor, at the bottom right column of Page 3,
13 the Court noted that in accordance with Section
14 56-5-2953(b), Trooper Davis prepared a sworn affidavit
15 certifying that his videotape equipment was inoperable at
16 the time of the arrest despite reasonable efforts to prepare
17 the equipment. It goes through how the trooper testified at
18 trial regarding his affidavit and how the affidavit was, was
19 introduced.

20 And Your Honor, basically what the Court ruled at the
21 end of the case was due to the fact that the affidavit had
22 been provided to defense counsel, it had been presented at,
23 at the trial, the trooper had it filled out appropriate to
24 explain the problem he had with his instrument. Because of
25 that reason, Your Honor, under 56-5-2953(b), the videotape

1 and the evidence it contains, which in this case was
2 roadside, but of course---

3 THE COURT: Does, does the case indicate exactly what
4 the affidavit did say?

5 SOLICITOR ELLIS: I don't believe it quotes it, Your
6 Honor.

7 THE COURT: It quotes his---

8 SOLICITOR ELLIS: It quotes his testimony.

9 THE COURT: ---testimony.

10 SOLICITOR ELLIS: Yes, sir.

11 THE COURT: And -- but that's only to the offense, to
12 the effect that he did sign an affidavit.

13 SOLICITOR ELLIS: That's correct, Your Honor.

14 THE COURT: But it doesn't indicate exactly what the
15 affidavit says, did it?

16 SOLICITOR ELLIS: No, sir, it does not.

17 THE COURT: Okay. Go ahead. I just wondered.

18 SOLICITOR ELLIS: Due to his testimony that it seems
19 clear that the affidavit was given to show the videotape was
20 presented at---

21 THE COURT: Apparently it addressed, the affidavit
22 addressed the fact that the equipment was inoperable.

23 SOLICITOR ELLIS: Yes, sir.

24 THE COURT: And from what I can read from the case that
25 perhaps it discussed something about efforts were made to

1 maintain or repair.

2 SOLICITOR ELLIS: Yes, sir.

3 THE COURT: Okay.

4 SOLICITOR ELLIS: And Your Honor, the State would argue
5 that the affidavit presented to Mr. Johnston, prior to
6 trial, and also, not, not today, but before today, and also
7 given to the Court would, would serve and suffice under
8 that, that provision of the statute to show that there was a
9 problem that the officer hadn't known about.

10 Next, Your Honor, if I could, I'd like to present---

11 THE COURT: Yes, sir.

12 SOLICITOR ELLIS: ---other cases. I've provided these
13 to Mr. Johnston also.

14 May I approach?

15 THE COURT: You may.

16 SOLICITOR ELLIS: Your Honor, the first case I handed
17 up is State v. Huntley, Supreme Court case. Citation 349
18 South Carolina 1. It's cited May 6th, 2002.

19 And brief facts of this case, Your Honor, are that this
20 was concerning a case that was done right after the law
21 changed from a standard impairment of .10 to a standard of
22 .08. And initially an officer offered a breath test to a
23 defendant using an old simulator that was basically, I guess
24 for lack of a better word, programmed to register .10 when
25 it should of been the newer lower standard. And as a

1 result, the defense appealed based on the fact that the
2 statute does not completely comply with, in that particular
3 instance, because .08 solution was not used to check it, the
4 instrument.

5 And reading at the bottom of the right column on Page
6 2, Your Honor, the last paragraph which runs into the final
7 page, the Court read or wrote rather even if the
8 breathalyzer operator did not use the simulator test
9 solution, the alcohol concentration required by Act 434,
10 Huntley, the defendant, was not prejudiced. There is no
11 question the breathalyzer machine was operating properly and
12 his results were reliable. Consequently the trial judge
13 erred by excluding Huntley's breathalyzer test results under
14 State v. Chandler. The Court cites Chandler for language of
15 exclusion of evidence should be limited to violation of
16 Constitutional rights and not statutory violations at least
17 where the defendant can not demonstrate prejudice at trial
18 resulting from the failure to follow statutory procedures.
19 Evidence of the simulator test was not run confirming with
20 that 434 goes to the weight and not the admissibility of
21 Huntley's breathalyzer results.

22 They're two cases I hand up, Your Honor, basically
23 affirmed Huntley. The case of Taylor versus South Carolina
24 Department of Motor Vehicles is a Court of Appeals case.
25 Citation 368 South Carolina 33 cited February 27th, 2006.

1 Basic facts of this case, Your Honor, as I'm sure the
2 Court's aware, the officer is suppose to not only read the
3 implied consent rights out loud to a defendant before asking
4 for a blood breath test and also provide him with a written
5 copy. In this case, the officer did read the rights out
6 loud and the defendant refused to provide any form of a
7 sample in this particular case. In this case, the defendant
8 was in the hospital and the officer was asking for a blood
9 sample.

10 The defendant stated he was not going to provide a
11 sample, at which point the officer did not provide the
12 defendant with a written copy of the form. But he had read
13 it out loud.

14 And basically, again, Your Honor, the State actually
15 cites Huntley. That citation is on Page 3 of the hand-out,
16 left-hand column. And, again, upheld the, the proposition
17 that evidence in a DUI case should not be suppressed unless
18 the defendant can essentially show some kind of prejudice,
19 some kind of a, of, not just a mere error of the law, but
20 some prejudice at trial from this particular error. And
21 that any problem would go to the weight and not the
22 admissibility of the evidence.

23 And finally, Your Honor, the most recent case through
24 this basic idea, which is State v. Landon, which is the case
25 that was decided in 2006, Your Honor. And this is the case

1 concerning the breath test in reference to the Data Master
2 and whether the records should be maintained, whether online
3 or the Data Master sites themselves.

4 And again, there are two elements to this case. Only
5 one of which is particularly relevant to this particular
6 issue. But on Page 3 of the hand-out, the Court notes the
7 issue of possible prejudice, and, and the very, the very
8 first paragraph on that, which is again Page 3 under
9 subsection 2 of the case, the Court said the State contends
10 the trial judge should not have suppressed Landon's breath
11 test results without applying any prejudice. We agree to
12 remand for an evidentiary hearing on the issue of prejudice,
13 and goes on to lay out the process by which the defendant
14 must show prejudice and then states what the recourse is at
15 that point.

16 So, Your Honor, the case law is clear in South Carolina
17 that in order to suppress evidence such as a breath test
18 result in a DUI case, it's necessary for the defendant to
19 show some kind of prejudice exists by the error. That a
20 simple error in the law is not, in and of itself, is not
21 enough to suppress the evidence or dismiss the case in these
22 kind of instances.

23 The State would argue that the State had, that the
24 officer has obviously complied to the best of his ability to
25 give the testimony that the Court's heard. Deputy Evett

1 complied, the best he could, with the requirements of the
2 statute. I believe he was complying fully with the
3 requirements of the statute.

4 Obviously there was an audio problem, but the State
5 would argue that, in the spirit of the law, basically
6 requires these safeguards to show that the process was done
7 and that the breathalyzer test or rather Data Master test
8 was working as it should of been. Clearly, it's, it's --
9 the Court is able to see that the deputy does advise the
10 defendant of his Miranda rights. He pulls the Miranda card
11 out of his pocket and reads it to him on the tape. The
12 defendant nods at the conclusion of that when the officer
13 looks at him. Then the deputy reads the implied consent
14 rights form to him, looks at the defendant when he's, when
15 he's done, and the defendant nods. The defendant's given a
16 copy of that form and he signs it, and then is given a copy
17 to keep.

18 There's another copy of that form taken to the glass in
19 the, that separates the two rooms in this Data Master
20 facility. We didn't watch that part of the tape, Your
21 Honor. But approximately the 32 minute mark of the tape,
22 the defendant actually gets and walks over to that
23 particular piece of glass and reads it for a period of time.
24 Never expresses any problem with the test or his
25 understanding of his rights, and then does provide a sample

1 at the end of the session, Your Honor.

2 Let me hand up just two more cases, Your Honor, on
3 certain points, Your Honor, very briefly. And again, I've
4 provided these to Mr. Johnston also.

5 May I approach.

6 THE COURT: You may.

7 SOLICITOR ELLIS: Your Honor, the first case I'd like
8 to discuss is just State v. Parker, which is a Supreme Court
9 case, citation 271 South Carolina 159. Cited July 10th,
10 1978.

11 And this case -- one of the issues that it considers,
12 Your Honor, is what must be done to admit the results of the
13 breath test into evidence at trial. And the Court
14 essentially lays that out, Your Honor, beginning on the
15 third full paragraph on the right column of Page 2 of the
16 hand-out.

17 Again, in the paragraph, the Court writes the question
18 we're called upon to determine is what foundation should be
19 layed for the introduction of results of the breathalyzer
20 test and skipping down slightly. Prior to admitting such
21 evidence, the State may be required to prove, one, that the
22 machine was in proper working order at the time of the test.
23 Two, that the correct chemicals had been used. And three,
24 that the accused was not allowed to put anything in his
25 mouth for twenty minutes prior to the test. And four, that

1 the test was administered by a qualified person in the
2 proper manner.

3 Their case, I'd like to bring to the Court's attention,
4 was Town of Mount Pleasant versus Shaw. Again, a Supreme
5 Court case. Citation 315 South Carolina 111 decided May
6 10th, 1993.

7 And in this particular case, Your Honor, the language
8 I'm concerned with is found on Page 2 of the hand-out. The
9 very top of the left-hand column, the first full paragraph
10 the issue is laid out. The Court writes that Shaw claims
11 that the advice that he received was insufficient to place
12 in my notice and he was not required to take the test. We
13 disagree. The comments, since reading of the advisory, and
14 it's clear the consequences, the consequences of both taking
15 the test and refusing to take the test.

16 And then going to the third full paragraph, that
17 column, Your Honor, in the middle of that paragraph -- under
18 the subsequent paragraph -- I'm sorry, Your Honor, third
19 full paragraph, left column, the Court writes we are
20 unpersuaded by Shaw's contention that the Legislature, in
21 passing Section 56-5-2950(a) contending that any particular
22 verbiage in the breathalyzer advisory. The purpose of the
23 advisory is not to persuade the driver to refuse testing.
24 But to let the driver know that serious consequence of
25 refusal.

1 And then finally, the last full paragraph on the right
2 column of Page 2, the Court writes if the arrested person is
3 reasonably informed of his rights, his duties, and
4 obligations under our implied consent law, he is either
5 tricked or misled into thinking he has no right to refuse
6 the test to determine the alcohol content in his blood,
7 urine, or breath, the test will generally be held
8 inadmissible.

9 Your Honor, as I cite these cases for three separate
10 points. First of all, to show, under 56-5-2953(a), of
11 course, videotaping does have to contain certain things,
12 certain elements or procedures. The State would argue that
13 the video does, in fact, contain those elements and
14 procedures. The officer can be seen advising the defendant
15 in his videotape, he's being videotaped, of Miranda rights,
16 and his implied consent rights.

17 Your Honor, it's an audio problem, which leads us to
18 Section 56-5-2953(b) and the affidavit. The officer
19 testified he had no way of knowing the audio had a problem.
20 Agent Baker backed that up and also confirmed that there was
21 no way the officer could of known it was an audio issue in
22 this particular case.

23 Agent Baker also testified that they make regular
24 efforts, in at least two separate manners, to ensure that
25 the Data Master and the videotaping device is all working as

1 they should. Clearly it didn't in this case despite that.
2 But regular efforts are made by SLED to try and make sure
3 that the equipment is working as it should, and, therefore,
4 Your Honor, the State would argue that exigent circumstances
5 did exist in this case, circumstances that the officer could
6 not have known about that were beyond his control, and that
7 really the, SLED may not have picked up on it. They just
8 looked at cases regularly throughout this four month period.
9 They just happened to get the cases where this, the audio
10 was working. There's no way they would of known of the
11 problem unless the officers would of picked up on it. And
12 as Agent Baker testified, the officers could not have known
13 that.

14 And so, basically the State would argue that there is
15 an exigent circumstance that existed in this case. Deputy
16 Evett was the breath test operator in this case. He was the
17 one who ran the breath test and was concerned with that
18 point of the investigation. Therefore, he is the officer
19 who signed that affidavit.

20 And, Your Honor, again, the three cases I've cited, in
21 the middle of which were Huntley, Taylor, and Landon, all
22 stand for the proposition that unless the defendant can show
23 some prejudice, show some way we can know that the defendant
24 didn't receive his warnings or that he was confused by them,
25 that this evidence should come in and should not be

1 suppressed.

2 And again, in the spirit of the law, the entire point
3 of the videotaping procedure is to make sure that the breath
4 test works and that the officer didn't do anything to try to
5 alter the test in some way or, or he didn't, he didn't mess
6 with the mouth piece, or he didn't do something that was
7 gonna alter the breath test.

8 Clearly, for 35 minutes of the video you can hear and
9 see everything. The eight minutes that you, that you got
10 some trouble with, in fact, the officer was actually in the
11 room with the defendant going through his procedural rights.
12 So, you can still see everything just fine. But hearing it
13 is a problem.

14 However, the State would argue that the spirit of the
15 law, as it is written here, the officer has complied
16 substantially with the law and the safeguards needed to make
17 sure that there is a correct breath test given, accurate
18 breath test given, that those requirements were met by the
19 officer.

20 And finally, Your Honor, the last two cases that I
21 cited were basically just to show that, without some kind
22 of -- well, basically -- I'm sorry. Without a violation of
23 any of the four requirements, under State v Parker, the
24 breath test result should be admissible. Again, the
25 requirements set out by Parker was that the machine was in

1. proper working order, the correct chemicals had been used,
2. and he was not allowed to put anything in his mouth for
3. twenty minutes before the test, and the test was
4. administered by a qualified person.

5. In this case, obviously the machine was in a proper
6. working order. There's been no argument about that, and the
7. entire argument has been about the video. The correct
8. chemical was being used. That was back when breathalyzers
9. were being used and the officer had to mix the chemicals.
10. Obviously we don't have chemicals in the Data Master. It's
11. in a different process. But I think you can relay that to
12. the Data Master passing self-checks wasn't working the way
13. it should of been. In this case, it was. It did pass all
14. the self-checks and the officer testified it was working.
15. And actually Agent, Agent Baker testified it was working
16. also if I recall.

17. If we'd reviewed the entire tape, the Court could of
18. seen the accused did not put anything in his mouth for more
19. than twenty, actually much more than twenty minutes.

20. And finally, the last requirement, Deputy Evett is a
21. qualified person under the D.P.S., the Department of Public
22. Safety, as well as the academy. He did administer the test
23. the proper way, and, of course, under Mount Pleasant versus
24. Shaw, if the, if the form was read, the implied consent form
25. was read to the defendant, he indicated he understood. At

1 that point, the defendant was deemed to have received a
2 completed advisement of his rights. This defendant did have
3 a copy of the form in his hands for some 35 minutes or so of
4 this period, and he also had another form on the glass,
5 which he did read, the officer read the form out loud to
6 him, and he did nod and indicate, indicate verbally
7 apparently that he understood the rights that were given,
8 given to him.

9 And Your Honor, for all these reasons, the State would
10 argue that the breath test in this particular instance
11 should be considered admissible and should not be
12 suppressed.

13 MR. JOHNSTON: May it please the Court, Your Honor?

14 THE COURT: Yes, sir.

15 MR. JOHNSTON: Your Honor, I have two problems with
16 this affidavit. The first is it's not sworn to by the
17 arresting officer in this case. It's sworn to by the Data
18 Master operator. The statute specifically requires that
19 the, any affidavits that will be considered, to take them
20 out from under the statutory requirements, have to be sworn
21 to by the arresting officer.

22 The second thing I'd like to point out is that we're
23 not going under, under this theory about the system is not
24 operable, reasonable efforts to maintain. We're not going
25 under that theory. That's not the box that's checked on

1 their affidavit.

2 Furthermore, there's a third prong to that---

3 THE COURT: Wait one second.

4 MR. JOHNSTON: Yes, sir.

5 THE COURT: Let me -- explain to me what you meant by
6 that.

7 MR. JOHNSTON: Your Honor, their -- they have a choice
8 of three different exceptions, statutory exception that they
9 can try to come under, and they didn't choose the one that
10 said the machine is inoperable, inoperable, but reasonable
11 efforts have been made to maintain it in an operable
12 condition. I've heard that mentioned several times. But
13 that's not the one that they're going under.

14 The one they're going under is that there was an
15 exigent circumstance. That is what they have represented in
16 their sworn affidavit. The reason they've done that is they
17 can't qualify, under the one above it, because that one also
18 requires that they say there's no other breath test facility
19 in the county. So, that one wouldn't work for them.

20 So, they went with the only one they possibly could,
21 which is this so called exigent circumstance. The exigent
22 circumstance being that the machine didn't work, that the
23 audio was inoperable.

24 Your Honor, I've tried to look at a meaning for exigent
25 circumstances and what---

1 THE COURT: well, I just looked it up on, online in
2 Webster's Dictionary.

3 MR. JOHNSTON: well, Your Honor, the meanings that I
4 have found are demanding, emergency.

5 THE COURT: Is requiring immediate aid or action is
6 what Webster's online says.

7 MR. JOHNSTON: Pressing.

8 Your Honor, this isn't an exigent circumstance. There
9 wasn't anything unusual, immediate, demanding, or emergency
10 about the situation at all. The reason this machine wasn't
11 working is because it wasn't in proper working order. It
12 wasn't checked often enough to know that it would work when
13 it was necessary that it be worked, and, in fact, when they
14 needed it to work, it did not function.

15 Your Honor, one of the other things I found about
16 exigent circumstance is that it can't be created by the
17 Government's action and I assume inaction. So, in fact,
18 they're trying to say that---

19 THE COURT: well, if you read it in the context of the
20 statute, it talks about someone who's in need of emergency
21 aid and then it goes on or exigent circumstances. Seems to
22 be referring to the defendant's condition as opposed to the
23 condition of the machine or something. That's the way I
24 read it at first blush. But --.

25 MR. JOHNSTON: Your Honor, I can only say that I don't

1 think the statute -- I'm not sure what's precisely meant in
2 the statute by it. I can just say that what they offered to
3 you doesn't qualify.

4 The other thing I am asking the Court to consider, I
5 heard Mr. Ellis talk about a lot of different cases. But he
6 didn't offer you the one that I think is the most
7 significant.

8 And if I may hand up a copy of that case to you at this
9 time?

10 THE COURT: Which one is that?

11 MR. JOHNSTON: This would be the City of Rock Hill
12 versus Suchenski.

13 THE COURT: Just read it.

14 MR. JOHNSTON: That's a 2000---

15 THE COURT: I just read it.

16 MR. JOHNSTON: That's a 2007 Supreme Court of South
17 Carolina case, more recent than any of the ones that
18 Mr. Ellis has cited to you.

19 This whole argument, based on the Huntley case about
20 having to show prejudice, that's rejected expressly,
21 explicitly by the Supreme Court in Suchenski. It says that
22 the statute provides the remedy, that if, that if the State
23 doesn't comply with the videotaping requirements, it must be
24 dismissed because that's what the statute said. It's a
25 different type of analysis than what came up in the Huntley

1 case. So, we think Suchenski has disposed of that matter.

2 Now, in Suchenski, it was also a videotaping issue. It
3 wasn't the videotaping at the breath site.

4 THE COURT: It was the arrest site.

5 MR. JOHNSTON: It was taken on the road. But I think
6 the analysis is the same and the statutory language is
7 essentially the same.

8 In that case, the officer assumed that he had plenty of
9 tape in his machine.

10 THE COURT: And it ran out.

11 MR. JOHNSTON: And it ran out. And there was no
12 conscious wrong doing on the officer's part. Just as in
13 this case, there's no conscious wrongdoing on the officer's
14 part.

15 I would argue to you that exigent circumstances does
16 not mean unfortunate circumstances. These are unfortunate
17 circumstances for the State's case. They fail -- they have
18 failed to comply with the statutory requirements.
19 Therefore, the charge must be dismissed according to the
20 statute.

21 Thank you.

22 THE COURT: Address the Rock Hill case for me.

23 SOLICITOR ELLIS: Yes, Your Honor. I feel I can
24 distinguish that case from the present case.

25 THE COURT: All right.

1 SOLICITOR ELLIS: The Rock Hill case, Your Honor, this
2 dealt with an in-car videotape. And in that particular
3 incident, of course, in-car tape contains things such as
4 questioning of a defendant on the roadside, sobriety tests,
5 things of that nature. Some of those things typically in a
6 field sobriety test may be considered by at least someone to
7 be somewhat subjective and sort of the clues or the signs
8 found by an officer that he would testify to in Court to
9 indicate whether a person was or was not impaired. That
10 could be based on subjective beliefs of the officer,
11 subjective observations of the officer.

12 In this -- and Suchenski, Your Honor, what basically
13 happened was again, the officer offered field sobriety tests
14 if I recall. Approximately two of the field sobriety tests
15 were captured along with the Miranda warnings.

16 THE COURT: The final and third one was not because the
17 tape ran out.

18 SOLICITOR ELLIS: Yes, sir.

19 THE COURT: Uh-huh. (Affirmative).

20 SOLICITOR ELLIS: And so, for that reason, at that
21 point, the -- and well, I'll get to that in a second. But
22 at that point the officer did not know there was a problem
23 with the tape, and, and did not replace the tape so that the
24 third test was not captured.

25 THE COURT: Yes, sir.

1 SOLICITOR ELLIS: I would distinguish that in, in this
2 way. In, in field sobriety test, of course, the idea is
3 that you videotape what happened with the field sobriety
4 testing so that you can, everyone can have a good idea of
5 what the officer saw he decided, from the clues that he saw
6 or didn't see, that person was impaired.

7 In a breath test situation as we have here, they're
8 many other ways we know if, if basically things are working,
9 if the machine was working as it should of been. First of
10 all, the machine runs a number of self-checks, which can be
11 found on the Data Master printout ticket that comes out with
12 the defendant's reading or, or, or breath alcohol content
13 level. It shows many of the self-checks printed out right
14 there and that shows that the machine was or was not working
15 as a problem or not.

16 Second, it's possible to go to the SLED website and see
17 not only all that information from the self-check, but also
18 a number of other just basically inquiries, problems,
19 calibration records, things of that nature, which would
20 never show up on a breath test ticket, but that can still be
21 accessed to show whether the machine was working as it
22 should of been and whether, in other words, the breath test
23 result was accurate. It's not a subjective reading. It is
24 what it is. A person's breast sample contains that certain
25 level of, of alcohol. That's just science. And if the

1 machine was working as it should of been, then that result
2 was accurate.

3 In this particular case, Mr. Johnston has shown nothing
4 to show that the breath test machine, the Data Master wasn't.
5 working, there's some kind of problem that prevented it from
6 working or that we can trust that reading.

7 Second of all, there was a videotape in this case. We
8 see the videotape, the entire length of it. It goes -- the
9 video never cuts off. It turns on before the officer begins
10 speaking to the defendant. It does cut off until after the
11 breath test results have already been printed out.

12 THE COURT: Yes, sir.

13 You know, Mr. Ellis, I had a case, I don't know, it's
14 been two or three months ago, where I had a police officer
15 giving Miranda rights and he gave the rights differently
16 from what the card said. He didn't -- he left out what I
17 considered to be a important right, which is a right to stop
18 cooperating at anytime.

19 So, I mean the fact that I can see him handing him the
20 card doesn't necessarily mean that he was told exactly what
21 was on the card.

22 Do you follow what I'm saying?

23 SOLICITOR ELLIS: I do, Your Honor.

24 THE COURT: Cause I've run into that situation exactly
25 within the last couple of months where an officer hands the

1 card, none of the officers involved in this matter, but
2 handed the card and gave a different warning from what was
3 on the card.

4 SOLICITOR ELLIS: Yes, sir, Your Honor, and I
5 understand your, your point.

6 THE COURT: When you listened to the tape. That one
7 worked.

8 SOLICITOR ELLIS: Yes, sir. But I still point out,
9 will point out, of course, that the officer did testify
10 about his reading of the Miranda rights to the defendant.
11 He read---

12 THE COURT: So, I think that, that's -- what I'm saying
13 is I think that's the reason that you have a videotape with
14 sound on it because it's important to hear what's going on
15 as well as see it.

16 SOLICITOR ELLIS: Yes, sir. Well, I suppose, again, I
17 would argue that the officer did testify that he read those,
18 those rights as they were written on this card, which
19 included the element that you, you were speaking of.

20 THE COURT: Uh-huh. (Affirmative.)

21 SOLICITOR ELLIS: He did read all of this to the
22 defendant in this particular case, and the defendant did
23 indicate he understood as can be seen on the video by the
24 defendant nodding his head at the conclusion of the, of the
25 officer reading to him from his card. You can see the card

1 pulled out on the video. The officer is looking down
2 towards his hands where the card is. He did testify he read
3 that card verbatim up on the stand today.

4 So, the State will argue that, that, again, there's no,
5 there's no real showing of prejudice there by the defense
6 that can be made.

7 The final point I have to distinguish, Your Honor,
8 between the Suchenski case and the present case is that I
9 believe that the videotaping issue in the Suchenski case was
10 something the officer could of controlled himself. In, in
11 that particular case, the officer obviously is the, is the
12 person who puts the VHS tape into the recording device of
13 his vehicle, and he is able to, at anytime he turns the
14 in-car camera on, access a, a camera or screen that's inside
15 his vehicle, and it shows a number of different things.

16 But one of the things it shows is how much time was
17 left on the videotape that he was using to record. If this
18 particular officer in Suchenski had looked up there and
19 realized he only had ten minutes or twenty minutes or
20 however much time remaining on his videotape, he could of
21 changed that either at some, some break he had that night or
22 prior to offering the test or once he pulled this defendant
23 over and realized he had a problem, he could of changed the
24 tape then. That was all in his control. He could of done
25 some to prevent the problem and he didn't do it.

1 In this incident case, Deputy Evett had no way of
2 knowing there was a problem as testified to by Agent Baker.
3 There was nothing he could of known or about -- there's
4 nothing he could of looked at to show that there was a
5 problem. There's nothing he could of done about it even if
6 he had known about it.

7 There's a problem that was beyond his control and
8 beyond his knowledge, and, and really there's no way he
9 could of remedied that situation on his own. Of course,
10 Agent Baker testified he tried to regularly monitor it as
11 well. But specifically concerning Deputy Evett, I believe
12 that's more applicable under the Suchenski analysis.
13 There's nothing Deputy Evett could of done, like Officer
14 Suchenski could of done to fix the problem. It wasn't an
15 officer driven problem. It was something that he, he didn't
16 know about.

17 THE COURT: Now, refresh my memory about the testimony.
18 I believe the SLED agent indicated that this was an ongoing
19 problem with this unit for some period of time. It had gone
20 on and off on, when he went back and reviewed it.

21 SOLICITOR ELLIS: Yes, sir, Your Honor. I believe he,
22 he stated roughly three or four months it was on, on again,
23 off again, did work some times, other times it did work
24 right.

25 THE COURT: And that was this unit only, not the other

1 units that were present?

2 SOLICITOR ELLIS: I believe that's correct, Your Honor.

3 But I also believe that the officer---

4 THE COURT: He's raising his hand.

5 why don't you talk to him about it?

6 WITNESS: Well, Your Honor---

7 THE COURT: I can't take testimony from you. Talk to
8 your lawyer.

9 (Pause.)

10 THE COURT: Yes, sir, Mr. Ellis.

11 SOLICITOR ELLIS: Judge, essentially the agent
12 testified, of course, for three or four months there was a
13 problem. He did attempt to monitor it. Obviously he didn't
14 catch all of them. And he didn't even know there was a
15 problem for that matter until roughly a week ago when I
16 realized there was a problem and brought it to his
17 attention.

18 At that point, he realized there was a problem and, and
19 went back to see if there was corrective action that needed
20 to be taken. At this point, no corrective action needed to
21 be taken. It was working as it should be with the audio in
22 that particular instance.

23 But that's correct, Your Honor, that, that, for, for
24 that particular instrument for a short period of time
25 several months ago there was a problem that occurred

1 occasionally, and, and the officer didn't know about it.
2 SLED didn't know about it either.

3 THE COURT: All right. Anything further, Mr. Johnston,
4 before I---

5 MR. JOHNSTON: Your Honor, just briefly.

6 THE COURT: ---take a moment to look over all this
7 myriad of cases I've been handed?

8 MR. JOHNSTON: At this point---

9 SOLICITOR ELLIS: Your Honor, I did have something else
10 if that's all right. I'm sorry.

11 THE COURT: That's all right. Excuse me.

12 SOLICITOR ELLIS: There was one more point I meant to
13 mention that distinguishes the Suchenski case from this
14 case. Although the Court may find that, that maybe the
15 wrong box was checked on the affidavit, one thing I wanted
16 to point out in the Suchenski case, there's no mention of an
17 affidavit. As far as I know, the officer never ever
18 submitted an affidavit to the Court to begin with.

19 THE COURT: No, he didn't. That's one of the problems.

20 SOLICITOR ELLIS: And, and in this particular case, the
21 officer did try to comply with the statute. He did submit
22 an affidavit. Of course, presented to the Court today as an
23 exhibit, and, and in noting and reviewing this decision, of
24 course, what the Suchenski Court decided or what they
25 ordered rather, essentially the fourth paragraph of Page 2

1 of the handout Mr. Johnston provided, left-hand column, the
2 Court writes on appeal to the Circuit Court, the city
3 reiterated its position that noncompliance was excused
4 pursuant to Section 56-5-2953(b). However, the Circuit
5 Court's order did not address or even mention the exception
6 to Subsection B.

7 And essentially the Court of Appeals or the Supreme
8 Court ruled that, together that the issue of Subsection B in
9 the affidavit was never even reserved in the first place
10 whereas the State is arguing and relying on Subsection B in
11 this particular case. The State acknowledges there was a
12 problem under Subsection A of 2953. The State is relying
13 partly, in part on Subsection B in effect that an affidavit
14 was given and, and the officer did make, attempt to make
15 substantial compliance with that part of the statute to
16 explain the problem sure as there was a problem. And the
17 audio wasn't working is not in his control.

18 That is unlike, again, the officer in Suchenski. And
19 again, the Court in Suchensik did not even address that
20 issue as it wasn't reserved.

21 THE COURT: Now, anything further, Mr. Johnston?

22 MR. JOHNSTON: Your Honor, I just wanted to note that
23 I, I, I saw no where in the Suchenski opinion where a factor
24 considered by the Court was the officer's control or lack of
25 control over these videotape machines opposed to the breath

1 test video system.

2 THE COURT: Suchenski I read to say just that the, that
3 the tapes that are required were not provided. And -- but
4 then they said there was also nothing provided to excuse---

5 MR. JOHNSTON: Yes, sir.

6 THE COURT: ---the failure.

7 MR. JOHNSTON: And they just discussed what the remedy
8 is---

9 THE COURT: Yes, sir.

10 MR. JOHNSTON: ---as opposed to the Huntley argument
11 and they also discussed the consent of exigent
12 circumstances.

13 Your Honor, my position is that these things -- it's
14 not whether or not the officer said these things or whether
15 or not he will testify that he said these things. It's that
16 the statute required that a videotape recording of him
17 saying those things be provided in evidence in the case.
18 The Legislature chose to impose this requirement, and the
19 statute treats breath test videos and or roadside videos and
20 breath incident site videos in exactly the same way.

21 There's no distinction between them and the remedy for the
22 failure to produce either of them is dismissal of the same.

23 THE COURT: All right. Give me a moment. I want to
24 step back and take a look at your cases, and then we'll be
25 back and make a ruling.

1 Court's in recess briefly.

2 THE COURT: All right. I've had an opportunity to
3 review the cases submitted by the State as well as the
4 information submitted by the defense in the case and a
5 chance to review the affidavit, which was dated April 14 of
6 '08 submitted by the testing officer.

7 Based on my review of that information as well as the
8 cases presented and primarily the case in Rock Hill, that,
9 the most recent case, the 2007 case involving a failure to
10 videotape, it will be my finding that the affidavit
11 submitted is not sufficient under the law as required. It
12 check -- it is checked that exigent circumstances existed,
13 and apparently even this problem was not discovered till
14 recently.

15 I note that the test was run several months ago, last
16 Fall I believe, and it was not even discovered that there
17 was a problem until very recently apparently. That there's
18 not been a showing of sufficient maintenance for the system.
19 Also, a showing that there's not sufficient review of those
20 tapes once that they're done.

21 I find that the, that the exigent circumstances didn't
22 exist because, of course, that requires immediate attention.
23 I'll look at that as a situation almost like if you went in,
24 and you needed to run a test, and you found out the machine
25 didn't work, no other machine's available, that would be

1 something that requires immediate attention. You have to do
2 the test right then. That's what's meant by exigent.
3 Immediate.

4 This wasn't handled immediately, hasn't been handled
5 immediately, and, and the affidavit I find is deficient.

6 So, for that reason under the statute, I am required to
7 dismiss the case.

8 Thank you very much.

9 If you'll prepare an order, Mr. Johnston---

10 MR. JOHNSTON: Yes, sir, I will.

11 THE COURT: ---I'll appreciate it.

12 MR. JOHNSTON: Thank you, Your Honor.

13 THE COURT: Thank you very much.

14 SOLICITOR ELLIS: Thank you, judge.

15

16 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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1 STATE OF SOUTH CAROLINA)

2 COUNTY OF SPARTANBURG)

COURT OF GENERAL SESSIONS

3
4 STATE OF SOUTH CAROLINA,)

TRANSCRIPT

5 PLAINTIFF,)

OF

6 VS.)

RECORD

7 PHILLIP WESLEY SAWYER,)

07-GS-42-5840

8 DEFENDANT.)

9
10 September 18th, 2008
11 Spartanburg, South Carolina

12
13 B E F O R E:

14 THE HONORABLE ROGER L. COUCH, Judge.

15
16 A P P E A R A N C E S:

17 ZACHARY D. ELLIS
18 ASSISTANT SOLICITOR
Attorney for the State

19
20 ANDREW JOHNSTON AND GERALD WILSON
21 ESQ.
Attorneys for the Defendant

22
23
24 PAMELA E. GREEN
25 Circuit Court Reporter
Seventh Judicial Circuit

I N D E X O F W I T N E S S E S

(There were no exhibits marked or testimony taken
during this hearing.)

P R O C E E D I N G S

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THE COURT: All right. We're ready to proceed.

4

I believe it's a motion to reconsider, is that right,

5

Mr. Johnston?

6

MR. JOHNSTON: Yes, sir, Your Honor.

7

We brought it to you in the form of a post-judgment, a

8

motion or post-judgment ruling.

9

THE COURT: Uh-huh. (Affirmative).

10

MR. JOHNSTON: And we're not exactly sure what the

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Court's position is. So, it's here either in, in a request

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for a clarification or a reconsideration depending on---

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THE COURT: All right. Well, if you tell me what your

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questions are I can see if we can't get to the bottom of it.

15

MR. JOHNSTON: Yes, sir. Thank you.

16

Your Honor, as you recall, we had an evidentiary

17

hearing before you in this case. There was a videotape made

18

of the Data Master procedure in this matter. Extensive,

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extensive portions, however, of the videotape provided no

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audio and the Court ruled -- it was a situation where there

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was two rooms. You can see the action, but you couldn't

22

hear any of the action.

23

THE COURT: Exactly.

24

MR. JOHNSTON: Much of the key -- the advisements and

25

warnings, including the Miranda warnings, including the

1 implied consent warning, were lost to us. We don't know --
2 we have no audio recording of what was said.

3 Based on that at this time, Your Honor, I asked the
4 Court to either dismiss the case in its entirety, based on
5 the, the Suchenski case, or, in the alternative, to suppress
6 the breath test results. The Court had asked us to submit
7 an order. We did. Then I had received word that the Court
8 was doing further consideration of the matter and asked both
9 sides to submit briefs.

10 That was done in this case. The Court issued its order
11 dated June 16th, 2008, in the case. And as I read the
12 order, the Court suppressed the video. But the issue of
13 whether or not the State could still admit the breath test
14 results through the testimony of the Data Master operator is
15 not directly addressed in your order.

16 So, we don't know if it was a denial of your request by
17 implication or if the Court simply didn't articulate it.
18 But that's what, what our concern is.

19 THE COURT: Well, the name of the Rock Hill case?

20 MR. JOHNSTON: Yes, sir.

21 THE COURT: What's the name of the case?

22 MR. JOHNSTON: City of Rock Hill versus Suchenski.

23 THE COURT: Spell that for me.

24 MR. JOHNSTON: S-U-C-H---

25 THE COURT: Just one second. Let me get right to the

1 case where I can pull that case back up.

2 THE COURT: S-U-C-H?

3 MR. JOHNSTON: Yes, sir. E-N-S-K-I.

4 And as I read the Suchenski case, it called for a
5 complete dismissal of the charges in that particular case.

6 THE COURT: No, it, in fact, was a complete dismissal
7 of the charges.

8 MR. JOHNSTON: Yes, sir.

9 THE COURT: But now the difference in that, this was
10 the failure of the video was at the scene.

11 MR. JOHNSTON: Correct, sir.

12 THE COURT: It did not show Miranda warnings. It did
13 not show any of the field testing that went on or any of the
14 basis for the arrest. I think it ran out, the tape ran out
15 before anything actually occurred.

16 Is that what I remember?

17 MR. JOHNSTON: Yes, sir, or at least substantially into
18 it, yes, sir.

19 THE COURT: Yes.

20 MR. JOHNSTON: I agree it was two different stages. I
21 certainly won't belabor the point. We felt like the same
22 principle would apply to the Data Master video, but you did
23 not agree with us. But that's fine.

24 THE COURT: well, the Suchenski case actually
25 specifically said, at the, at the end -- let me get down to

1 there. See if I can find the quote. I didn't get a chance
2 to pull this file this morning.

3 MR. JOHNSTON: Yes, sir.

4 THE COURT: Just one second.

5 (Pause.)

6 THE COURT: It discussed the fact that preservation was
7 not, was -- failure to preserve the, the issue concerning
8 whether or not they could go forward with the prosecution.
9 And so, they, they basically said we're not making the
10 decision whether or not the State can go forward, and by
11 implication, left that door open.

12 MR. JOHNSTON: I can see exactly where the Court is
13 going with that point. So, I'm not here to belabor this
14 matter. What, what I would like to belabor, if I may, is
15 that we think the fact that the State did not follow the
16 requirements of the videotape statute in the Data Master
17 means that the Data Master test must be suppressed at trial.

18 THE COURT: All right. Let's see what Mr. Ellis has to
19 say about it.

20 SOLICITOR ELLIS: Well, Your Honor, in this particular
21 instance the State would agree with Your Honor's earlier
22 ruling. Your Honor obviously, as in your getting at the
23 Suchenski case is different from the particular case and
24 distinguished due to the fact that in Suchenski there was no
25 preservation of the issue of the affidavit being submitted

1 by the State, and, therefore, the Court never considered
2 that whatsoever. Where the case differed, we obviously do
3 have an affidavit that would, in the State's opinion, comply
4 with the requirements of 56-5-2953(b). Again, Your Honor,
5 you've already heard hours of testimony.

6 THE COURT: well, I recall the case and the intent of
7 my ruling was that, that the Data Master would be
8 suppressed.

9 Okay. Now, the -- but now that does not prevent the
10 State from going forward with the prosecution.

11 MR. JOHNSTON: We understand.

12 THE COURT: Obviously people are prosecuted quite often
13 who refuse to take the test altogether.

14 MR. JOHNSTON: Absolutely.

15 THE COURT: And I think my reading of the Suchenski
16 case, although it didn't state specifically, was that the
17 fact, one of the factors is since the initial arrest none of
18 this was preserved. That if you can't get past the point of
19 arrest, I don't know if you can get to giving him the Data
20 Master.

21 Do you follow me?

22 So, it seems like to me---

23 MR. JOHNSTON: Yes, sir.

24 THE COURT: ---total dismissal would -- okay. Whereas
25 here we do have preservation of the circumstances of the

1 arrest, any field sobriety test that took place, warnings
2 that took place, and he can also testify concerning
3 observations of driving and things of that nature. So,
4 prosecution could go forward based on that information. But
5 I will suppress the Data Master test and results.

6 MR. JOHNSTON: I'm satisfied with that result, sir.

7 THE COURT: And I will allow the State to go forward in
8 the prosecution if you choose to do so.

9 SOLICITOR ELLIS: Yes, sir, Your Honor. Again, we
10 already argued ad nauseam. But, but I suppose my confusion
11 is, again, Mr. Johnston pointed out just the fact earlier
12 mentioned only the videotape language the Court noted under
13 56-5-2953(b). Nothing in this section prohibits the Court
14 from having any valid reason of failure to---

15 THE COURT: well, I did consider the fact that this
16 particular problem apparently existed for some period of
17 time, as my recalling of the information I received, without
18 being detected. There is a duty under the statute to
19 maintain the equipment if A, in an orderly, in a reasonable
20 basis by the, by the State, by -- the State apparently did
21 not check the machine for audio problems. I realize they
22 would look at the tape and see it was taping. But they
23 didn't check to see if the, if the sound was being recorded.

24 And because of the status of the DUI law at this time,
25 the Miranda, the warnings, those things, although may not be

1 required in the same way today, at this time they were, and
2 it's my finding that if you didn't preserve those warnings
3 being given prior to the Data Master test being given, and
4 that was a result of an equipment failure, and in this case,
5 that appeared that equipment failure went on for some time
6 without being detected.

7 It's my ruling that it should be suppressed.

8 You still can go forward with your prosecution based on
9 what other evidence you may have.

10 SOLICITOR ELLIS: Yes, sir.

11 THE COURT: So, Mr. Johnston, if you think an order
12 clarifying this will be in order, you may submit that. Be
13 sure to send a copy to Mr. Ellis. And that would hopefully
14 end the matters as far as I'm concerned.

15 MR. JOHNSTON: Yes, sir, I thank you for hearing us
16 this morning.

17 THE COURT: Thank you very much.

18 SOLICITOR ELLIS: Thank you, judge.

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20 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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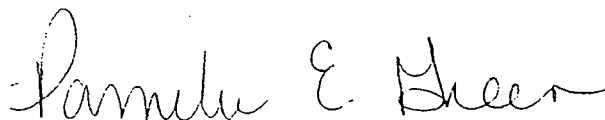
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 18th day of September, 2008.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

November 18th, 2008



PAMELA E. GREEN, Court Reporter

FAILURE TO VIDEO

94

I affirm that I cannot produce a videotape of the breath test I offered because:

() At the time of the defendant's arrest the facility I was operating had not yet been equipped with device and therefore, pursuant to Section 18 of Senate Bill 174 of 1998, the videotaping requirement

() At the time I offered a breath test to the defendant, the video equipment in the facility I was operating was inoperable condition and reasonable efforts had been made to maintain the equipment in an operable condition

() It was physically impossible to produce a videotape from the facility I was operating of the Defendant at the time of the arrest or probable cause determination because:

() The Defendant needed emergency medical treatment, or

☒ Exigent circumstances existed which are outlined below:

THE ARREST OF THE SUBJECT FIRST OCCURRED WHILE I WAS SUPERVISING

Other valid reasons existed for failing to produce the videotape based on the totality of the circumstances. The reasons are outlined below:

If additional room is needed for an explanation, please attach a separate sheet to this form referring to the number addresses.

State of South Carolina

County of Spartanburg

Signature of Officer [Signature]

Date 04-14-08

Sworn to and subscribed

Before me this 14 day of April 20 08.

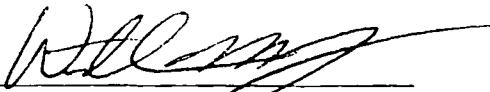
Cody B. Boone Notary Public for the State of South Carolina

My Commission Expires: 6-3-2012



CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: 
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ATTORNEYS FOR APPELLANT

October 9, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

THE STATE,

Appellant,

vs.

PHILLIP SAWYER,

Respondent.

PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Amended Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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

This 9th day of October, 2009.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

Appellant,

vs.

PHILLIP WESLEY SAWYER,

Respondent.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
ARGUMENT	6
I. The trial court erred in suppressing the video recording of the breath test site, testimony or evidence that a breath test was offered or administered, and the results of Respondent's breath test.	6
II. Given the totality of the circumstances and the affidavit submitted by Deputy Evett in this case, the trial court should have allowed the video recording, any evidence regarding the breath test, and the results of the breath test to be admitted.	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:

<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	3
<u>City of Rock Hill v. Suchenski</u> , 374 S.C. 12, 646 S.E.2d 897 (2007)	8, 9, 13
<u>State v. Dicapua</u> , 373 S.C. 452, 636 S.E.2d 150 (Ct. App. 2007)	9
<u>State v. Gaines</u> , 380 S.C. 23, 32, 667 S.E.2d 728 (2008)	6
<u>State v. Huntley</u> , 349 S.C. 1, 562 S.E.2d 472 (2002)	9
<u>State v. McKnight</u> , 287 S.C. 167, 168, 337 S.E.2d 208 (1985)	2
<u>State v. Odom</u> , Op. No. 26624 (S.C. Sup. Ct. filed March 30, 2009)	9
<u>State v. Pittman</u> , 373 S.C. 527, 561, 647 S.E.2d 144 (2007)	6

Other Authorities:

S.C. Code Ann. § 56-5-2953 (Supp. 2006)	7-9, 11-13
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STATEMENT OF ISSUES ON APPEAL

- I. The trial court erred in suppressing the video recording of the breath test site, testimony or evidence that a breath test was offered or administered, and the results of Respondent's breath test.

- II. Given the totality of the circumstances and the affidavit submitted by Deputy Evett in this case, the trial court should have allowed the video recording, any evidence regarding the breath test, and the results of the breath test to be admitted.

STATEMENT OF THE CASE

Phillip Wesley Sawyer, Respondent, was charged with one count of driving under the influence, second offense pursuant to section 56-5-2930 of the South Carolina Code. The case was called for trial on April 15, 2008, before the Honorable Roger L. Couch. Prior to the jury being sworn, Respondent moved to dismiss the case or in the alternative suppress the breath test site evidence pursuant to section 56-5-2953 of the South Carolina Code (Supp. 2006). Both parties submitted briefs on the issues, and the State asked the court to reconsider its oral ruling and not suppress the videotape. On June 16, 2008, Judge Couch issued an order suppressing the video recording.

Respondent moved to reconsider or clarify the order of the Court. The parties submitted briefs and the Court held a hearing on the motion on September 18, 2008. On October 6, 2008, Judge Couch filed an Order on Motion for Post-Judgment Ruling to amend his prior ruling.

Pursuant to the standard found in State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985), the State timely served and filed a Notice of Appeal on October 15, 2008. This appeal follows.

STATEMENT OF FACTS

After Respondent was arrested for DUI, he was taken to the Spartanburg County Detention Facility in order for a breathalyser test to be administered. Deputy Evett placed Respondent in the subject test area and then went into an adjoining room to activate the video recorder equipment. (T.31-33; R.18-20). He returned and proceeded to read Respondent his Miranda¹ rights as well as the informed consent form. (T.32; R.19; Ct. Exhibit 1, DVD). Respondent signed the form and was given a copy. (T.34; 36-39; R.21; 23-26; Ct. Exhibit 1, DVD). Deputy Evett then checked Respondent's mouth and began the twenty-minute waiting period prior to administering the breath test. (T.39; R. 26; Ct. Exhibit 1, DVD). Deputy Evett then administered the test to Respondent.

At a pretrial hearing, Respondent moved to dismiss the case or in the alternative suppress the video recording of the breath site, any testimony or evidence related to the administration of the breath test, and the results of the Datamaster breath test because he claimed the State failed to comply with section 56-5-2953 of the South Carolina Code (Supp. 2006). (T.21; R. 8). The State produced a copy of the video recording of the breath site, which was played for the judge. (T.27; R.14; Ct. Exhibit 1, DVD). The audio, however, from the room in which Respondent was kept was not recorded. (T.24-25; R.11-12; Ct. Exhibit 1, DVD).

At the hearing, Deputy Evett testified he had no way of knowing the audio was malfunctioning and not recording. He testified when he turned on the video recorder, it displayed what it was recording on a monitor, but there was no way to verify the audio

¹Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

portion was being recorded properly. (T.33-34; R. 20-21). Further, he testified he was not aware of the malfunction and no one at the jail had indicated there was a malfunction in that room's microphone. (T.42; 45-46; R.29; 32-33).

Deputy Evett testified he informed Respondent he was being videotaped and then read Respondent his Miranda rights. Respondent indicated he understood the rights and accompanied the acknowledgment with a visible nod of his head. (T.36-37; R. 23-24; Ct. Exhibit 1, DVD). Deputy Evett stated he then read through the notification of informed consent, had Respondent initial each page and sign where appropriate. A copy of the form was given to Respondent. Deputy Evett indicated on the video recording that Respondent acknowledges his understanding of the informed consent notification with a visible nod of his head. (T.38-39; R.25-26; Ct. Exhibit 1, DVD). The video recording also showed Deputy Evett checking Respondent's mouth, Respondent waiting twenty minutes, and the breath test being administered. (T.39-40; R.26-27; Ct. Exhibit 1, DVD).

After learning the recording did not include audio, Deputy Evett provided an affidavit indicating he had no knowledge at the time of the breath test that the audio was not recording as intended. He indicated exigent circumstances existed regarding the failure of the audio because it was unknown and beyond his control. (T.29; 77; 81; State's Exhibit 1; R. 16,).

Agent Baker with SLED testified at the hearing that SLED performs the maintenance and checks on the Datamaster systems. He testified when asked by the State to review the system at the Spartanburg County Detention Facility he found a four month period in which the audio would sometimes be recorded and other times would not be recorded by the recorder used by Deputy Evett to record Respondent's breath test site . (T.49-50; 59-60;

R.36-37; 46-47). Further, he testified the system appeared to fix on its own because it was currently working and no one had done anything to fix the system. (T.55-56; R.42-43). Finally, he testified there was no means for Deputy Evett to verify the audio was properly recording before beginning the test. (T.51-54; 61-62; R.38-41).

After hearing argument from counsel and receiving briefs from both parties, the trial court suppressed the video recording and evidence of the administration of a breath test, including the results of the breath test. The Court found the State failed to comply with section 56-5-2953 because the audio was not recorded. (Ct. Order dated June 16, 2008; R. 1). After a motion to reconsider or clarify filed by Respondent, the circuit court amended its order to suppress not only the videotape, but also all evidence or testimony related to the offering of a breath test as well as the result of the breath test. (Ct. Order filed October 6, 2008; R. 2). The State filed this appeal.

ARGUMENT

- I. **The trial court erred in suppressing the video recording of the breath test site, testimony or evidence that a breath test was offered or administered, and the results of Respondent's breath test.**

The State maintains the trial court erred in suppressing the video recording as well as testimony or evidence a breath test was conducted and the results of that test. While the video recording does not include audio of the total time Respondent is at the breath test site, the State produced the video recording as required by section 56-5-2953 of the South Carolina Code (Supp. 2006), and any deficiency in the video recording should go to its weight and not its admissibility. Under the plain language of the statute, the State complied with the requirements of the statute and suppression of the evidence was not proper.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Pittman, 373 S.C. at 561, 647 S.E.2d at 161.

Section 56-5-2953(A) of the South Carolina Code (Supp. 2006) requires: "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 videotaped." The statute specifies the required events of the breath test site that must be recorded:

2) The videotaping at the breath site:

(a) must be completed within three hours of the person's arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 or a probable cause determination that the person violated Section 56-5-2945, unless compliance is not possible because the person needs emergency medical treatment considered necessary by licensed medical personnel;

(b) must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test;

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

(d) must 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 videotape this waiting period. However, if the arresting officer administers the breath test, the person's conduct during the twenty-minute pre-test waiting period must be videotaped.

S.C. Code Ann. § 56-5-2953(A)(2) (Supp. 2006). Section 56-5-2953(B) of the South Carolina Code (Supp. 2006) requires the officer to produce the videotape or submit an affidavit explaining the failure to produce the videotape.

This case does not involve the failure to produce the breath test site video recording. Respondent received a copy of the video recording and was able to review the contents of the recording. Deputy Evett activated the recorder as required and all interactions between

Deputy Evett and Respondent at the breath test site were recorded. The videotape clearly showed the reading of the Miranda warnings, the officer informing Respondent of the videotape and his right to refuse the breath test, as well as all the breath test procedures. (T.34-40; R.21-27; Ct. Exhibit 1, DVD). It is significant to note Respondent has never challenged the validity of the Miranda warning he was given, whether he was properly informed of the videotape and his right to refuse the breath test, nor the actual test procedures utilized by Deputy Evett.

The State has complied with section 56-5-2953 by producing a videotape with all required events documented. Thus, since the videotape was produced, an affidavit from the arresting officer meeting the requirements of section 56-5-2953(B) was not required, and the videotape and all evidence related to the breath test should have been admitted into evidence.

The trial court's reliance on City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 897 (2007), is misplaced. In Suchenski, the arresting officer's vehicle recorder ran out of tape before the defendant was arrested, and as a result, there was no recording of the last field sobriety test or the arrest, both events required to be recorded under the statute. Thus, under the statute, the officer could not produce a videotape of all of the required events. The officer testified a tape had never ended during an arrest before, and he did not know the tape was about to run out, but assumed the videotape was running as usual. The magistrate denied the defendant's motion to dismiss, finding exigent circumstances excused full compliance with the statute. The circuit court reversed on appeal. The South Carolina Supreme Court affirmed, finding the City's claim of exigent circumstances was not preserved

for review, and in the absence of an exception, section 56-5-2953(B) required dismissal of the charge. Id.

In this case, unlike Suchenski, the State produced a videotape of the entire breath test site and all events required to be documented under the statute. See Section 56-5-2953(A)(2). While the audio is missing, the videotape was produced as required by the statute and the court should have found it admissible as evidence. See Section 56-5-2953(A) (videotapes of incident and breath test sites are admissible as evidence in a criminal proceeding).

Any defects in the videotape go to its weight rather than admissibility. See State v. Dicapua, 373 S.C. 452, 636 S.E.2d 150, 153 (Ct. App. 2007) (Stilwell, J., concurring opinion) (lack of audio on surveillance videotape of drug sting went to the weight of the evidence, not its admissibility), *cert. granted* April 17, 2008; see also, State v. Salisbury, 330 S.C. 250, 498 S.E.2d 655, 665 (Ct. App. 1998) (conflict in testimony regarding condition of breathalyzer machine went to weight of the test results rather than admissibility of the evidence), *aff'd as modified*, 343 S.C. 520, 541 S.E.2d 247 (2001). Defects in evidence or procedure generally do not affect admissibility. See, e.g., State v. Odom, Op. No. 26624 (S.C. Sup. Ct. filed March 30, 2009) (Shearouse Adv. Sh. No. 15 at 11) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

The statutory language required the production of the videotape. The tape was produced in this case and the State met the clear language of the statute. The legislative intent was to require the State to document the steps taken at the breath test to ensure a fair procedure was used and the intoxicated individual's rights were not violated. The videotape in this case meets that legislative intent because it shows Respondent being read his Miranda

rights, being informed of the videotape and the right to refuse the breath test, the procedure used by Deputy Evett in conducting the breath test, and Respondent's acknowledgment and compliance with each step. At trial, Respondent would have the opportunity to challenge any deficiency in the procedures, and Deputy Evett would have the opportunity to explain the procedures used. It should then be up to the jury to determine the weight to assign to the evidence and testimony before them and then render their verdict.

Therefore, the circuit court erred in suppressing the videotape of the breath test site, testimony or evidence of the fact a breath test was conducted, and the results of the breath test. The State complied with the statute requiring that a videotape be produced showing the required events at the breath test site. Any defect in the produced videotape affects its weight as will be determined by the jury and not its admissibility into evidence. As a result, the decision of the circuit court should be reversed.

II. Given the totality of the circumstances and the affidavit submitted by Deputy Evett in this case, the trial court should have allowed the video recording, any evidence regarding the breath test, and the results of the breath test to be admitted.

Even if this court finds the videotape violates section 56-5-2953(A), mitigating circumstances under 56-5-2953(B) exist, and the trial court should not have suppressed the videotape, any evidence related to the offer of a breath test, or the results of the breath test. Given the totality of the circumstances in this case, especially considering the failure of the audio was completely beyond the control of the officer, the court should not have suppressed the evidence.

Section 56-5-2953(B) contains a failsafe for the court to consider extenuating circumstances:

(B) Nothing in this section may be construed as prohibiting the introduction of other 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 videotapes 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 videotape equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating 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 videotape because the person needed emergency medical treatment, or exigent circumstances existed. . . . Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape 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 videotape.

S.C. Code Ann. § 56-5-2953(B) (Supp. 2006) (emphasis added).

The solicitor asked the court to view the failure of the audio in light of the circumstances of the instant case and to consider the fact the failure was beyond the control of Deputy Evett and had even escaped routine maintenance because it was a malfunction that was not a chronically occurring problem. (T.72-73; 76-78; R. 59-60; 63-65). There was no failure on the part of Deputy Evett to perform his duty under the statute. He started the videotape when he was required to do so and verified to the best of his ability that it was recording. As Agent Baker explained, the only means to verify the videotape was functioning properly was to view what it was recording on a monitor. The main problem was at the time of this incident, there was no means to verify the audio was functioning properly. It is logical for Deputy Evett to assume because the video portion recorded and displayed properly on the monitor that the audio also worked.

This is not a situation in which the officer intentionally tried to manipulate the video, disguise his actions, or violate Respondent's rights. Deputy Evett did everything within his power to preserve on video the breath test site as required by section 56-5-2953. Given the totality of the circumstances, including the fact Deputy Evett followed proper procedure, he had no means prior to performing the test of verifying the functioning of the audio portion of the recording, and the fact Respondent has not challenged the actual procedures used by Deputy Evett, the circuit court erred in not finding the videotape and other breath test related evidence admissible.

Further, the statute allows the officer to file an affidavit indicating some exception to the requirements, including exigent circumstances, existed which resulted in the failure

to comply with the statute. In this case, Deputy Evett provided an affidavit indicating exigent circumstances existed because he had no means of knowing the audio malfunctioned and its malfunction was beyond his control. (T.29-30; 77; 81; State's Exhibit 1; R. 16-17; 64; 68; 94). Deputy Evatt was the appropriate officer to file the affidavit because he was the only officer with personal knowledge of the breath test site. The intent of the statute, while indicating the arresting officer should produce an affidavit is clearly to require the officer with personal knowledge of the videotape in question to produce the affidavit. The circuit court should have found his affidavit sufficient given the circumstances of this case. See City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 897 (2007) (Burnett, J., dissenting opinion) (arguing exigent circumstances existed when the officer started tape, but it ran out prior to completion of the events required to be videotaped at the incident site). Accordingly, this Court should find suppression was improper because an exception to producing a full videotape was provided pursuant to section 56-5-2953(B).

CONCLUSION

Based on the foregoing, Appellant State of South Carolina respectfully submits the circuit court's Order suppressing the videotape of the breath test site, evidence or testimony of the breath test, and the breath test results should be reversed, and the case remanded to the circuit court to allow the trial to proceed with the admission of the videotape, the evidence and testimony related to the breath test site, and the test results.

Respectfully submitted,

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October 29, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

Appellant,

vs.

PHILLIP WESLEY SAWYER,

Respondent.

PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Final Brief of Appellant on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 29th day of October, 2009.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
The Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

Appellant,

vs.

PHILLIP WESLEY SAWYER,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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ATTORNEYS FOR APPELLANT

October 29, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

APPELLANT,

V.

PHILLIP SAWYER,

RESPONDENT.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES ON APPEAL	3
STATEMENT OF THE CASE.....	4
ARGUMENT	5
CONCLUSION	14
CERTIFICATE OF COUNSEL	15

TABLE OF AUTHORITIES

Cases

<u>City of Rock Hill v. Suchenski</u> , 374 S.C. 12, 646 S.E. 2d 879 (2007).....	9, 12, 13
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966)	6
<u>State v. Landis</u> , 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004)	9, 10

Statutes

S.C. Code Ann. § 56-5-2953(A)(2) (Supp. 2006)	8, 10, 12, 13
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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in suppressing the video recording of the breath test site, any evidence and testimony concerning the breath test, and any results from the breath test?
2. Under the totality of the circumstances and the affidavit submitted by Deputy Evett who administered the breath test, should the trial court have admitted the video recording, evidence concerning the breath test, and the results of the breath test?

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case as presented in the state's initial brief dated April 14, 2009.

ARGUMENT

1.

The trial court was correct in suppressing the video recording of the breath test site, any evidence and testimony concerning the breath test, and any results from the breath test.

Phillip Sawyer was arrested and charged with driving under the influence (DUI) on September 13, 2007 in Spartanburg County. ROA. 90, ll. 23 – 25; ROA. 91, ll. 1 – 10. Deputy David Evett testified that he responded to Lt. Woodward's traffic stop for transportation and a Data Master. Deputy Evett said he was certified by SLED as a Data Master operator. ROA. 17, ll. 6 – 25; ROA. 18, ll. 1 – 23.

Deputy Evett took Sawyer to jail and placed him in the room used for video recording which was next to the room where the Data Master machine was kept. He allegedly activated the video and audio recording device in the room with the Data Master. He stated he then returned to the room where Sawyer was held and he allegedly read the *Miranda*¹ rights to Sawyer as well as the implied consent form. He believed the recording device was operating correctly. ROA. 19, ll. 1 – 25; ROA. 20, ll. 1 – 13. Deputy Evett said he believed Sawyer understood his rights as he nodded his head up and down. ROA. 24, ll. 1 – 25; ROA. 25, ll. 1 – 25.

Deputy Evett admitted on cross examination that he was not the arresting officer. ROA. 27, ll. 10 – 17. He admitted that the recording device did work properly and no sound was recorded as no one could hear him read the rights or anything else to Sawyer. He said there was supposed to be audio. He admitted that he did not check the microphones and did not know how. ROA. 27, ll. 18 – 25; ROA. 28, ll. 1 – 25.

Agent Brett Baker of SLED, who administered the program on the breath alcohol testing devices, testified that he did not know what the problem was with the device. ROA. 36, ll. 16 – 25.

He admitted that SLED was responsible for regulating the breath alcohol tests and that they were required by statute to inspect the breath testing devices every twelve weeks. He said they tried to check the video recoding device then also. ROA. 34, ll. 7 – 25; ROA. 35, ll. 1 – 15.

Agent Baker said from his research, that the device had not been working properly for four months. ROA. 42, ll. 16 – 25; ROA. 43, ll. 1 – 10.

Defense counsel made a motion pretrial for the court to dismiss the charges against Sawyer, or in the alternative, to suppress the results of the Data Master test. ROA. 8, ll. 16 – 25. Counsel explained that according to South Carolina Code Section 56-5-2953, the state has to meet certain requirements in a DUI case. One of the requirements is that there be videotaping at the breathalyzer site of the reading of the *Miranda* rights, the breath test procedure, the person being informed that he is being videotaped and can refuse the test. Counsel said no sound was recorded as the audio was not working. Because of that, counsel argued that the state had not complied with the statute 56-5-2953. ROA. 9, ll. 1 – 25; ROA. 10, ll. 1 – 25; ROA. 11, ll. 1 – 9.

Counsel also argued that the affidavit the state submitted did not meet any of the exceptions in the statute. ROA. 11, ll. 5 – 9.

The state responded that they agreed that the audio malfunctioned but that the video was working and it was possible to see the officer reading *Miranda* rights and the implied consent form. ROA. 11, ll. 12 – 25; ROA. 12, ll. 1 – 25; ROA. 13, ll. 1 – 25.

The state argued that the statute provided that if there were a problem where the videotapes could not be produced, then the arresting officer could submit a sworn affidavit certifying that the equipment was inoperable at the time and no other operable breath test facility was available; or it was impossible due to needed emergency medical treatment; or exigent circumstances. ROA. 15, ll. 9 – 25; ROA. 16, ll. 1 – 4.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

The solicitor then provided the court with an affidavit that Deputy Evett signed stating there was a problem with the audio recording due to exigent circumstances which were outside his control. The state argued that Deputy Evett was the breath test operator so he was the one who signed the affidavit. ROA. 16, ll. 5 – 25; ROA. 64, ll. 14 – 19.

The state told the court that the exigent circumstances were that Deputy Evett did not know the audio was not working so the circumstance was beyond his control. ROA. 63, ll. 17 – 25; ROA. 64, ll. 1 – 19.

Defense counsel argued that the affidavit was not sworn to by the arresting officer as required by the statute and that the state did not check the box that the system was not operating as the reason for the problem on the affidavit. The state chose the exigent circumstances exception that the machine did not work. ROA. 67, ll. 13 – 25; ROA. 68, ll. 1 – 25.

Counsel defined the word “exigent” from Webster’s Dictionary as meaning emergency, pressing, and demanding. He told the court that this was not an exigent circumstance. ROA. 69, ll. 1 – 24.

The court ruled that the affidavit was insufficient because the state checked exigent circumstances as the exception and the exigent circumstances did not exist because the problem had been there but was not discovered until recently. The court also ruled that there was no showing of sufficient maintenance for the system, and there was not a sufficient reviewing of the tapes. He dismissed the case. ROA. 82, ll. 1 – 25; ROA. 83, ll. 1 – 14.

On June 16, 2008, the judge issued an order suppressing the video but stating that the state could go forward on any other evidence. On September 18, 2008, a hearing was held on defense counsel’s motion for clarification or reconsideration of the June 16th ruling. Defense counsel said he needed clarification from the judge’s written order on June 16, 2008 where the judge suppressed the

video. Counsel said it was not clear whether the state could still admit the results of the breath test through the testimony of the Data Master operator. September 18, 2008 Transcript; ROA. 86, ll. 2 – 25; ROA. 87, ll. 1 – 18.

The judge ruled on September 18, 2008 that the Data Master test and its results were suppressed but that the state could go forward with the prosecution using other evidence such as the field sobriety test, observations of driving, and things of that nature. ROA. 91, ll. 1 – 5.

South Carolina Code Section 56-5-2953 provides: “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 videotaped.” The statute identifies the requirements to be recorded:

2) The videotaping at the breath site:

(a) must be completed within three hours of the person’s arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 or a probable cause determination that the person violated Section 56-5-2945, unless compliance is not possible because the person needs emergency medical treatment considered necessary by licensed medical personnel;

(b) must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test;

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

(d) must 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 videotape this waiting period. However, if the arresting officer administers the breath test, the person’s conduct during the twenty-minute pre-test waiting period must be videotaped.

S.C. Code Ann. § 56-5-2953(A)(2) (Supp. 2006).

The state argues on page eight of their Initial Brief that the state has complied with the statute because they produced a video even though no sound was included. Judge Couch stated

at the June hearing that it was important to hear what was going on because he recently had a case where the officer gave the *Miranda* rights differently from what was on the card. He left out an important right. ROA. 74, II. 3 – 25; ROA. 75, II. 1 – 15. The Legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). In interpreting a statute, the determination of legislative intent is a matter of law. Id.

The Legislature clearly intended for the videotape to include the sound portion since they required the reading of *Miranda*, as well as the person being informed of other rights and the implied consent form. Otherwise, the statute would have stated that the video portion was sufficient.

South Carolina Code Section 56-5-2953(A)(1)(a)(iii) provides that the video recording at the incident site must include the arrest of the person "and **show** the person being advised of his *Miranda* rights." Section 56-5-2953(A)(2) which describes what the video recording at the breath test site must include does not include the word "show." Therefore, if the Legislature meant that only the video portion at the breath test site was acceptable, they would have included the word "show" again. The spirit of the law the "totality of the circumstances" require a logical reading of the statute.

In City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (2007), the Supreme Court ruled that dismissal of the charge of DUAC (arrest was for DUI), for the arresting officer's failure to provide a complete videotape from the incident site was the appropriate remedy. In that case, the officer began the tape and taped two field sobriety tests but ran out of tape before the third field sobriety test was administered. The officer said it had never happened before and he did not know the tape had run out. The municipal court denied the motion to dismiss on the

grounds of exigent circumstances. On appeal, the circuit court reversed and dismissed the charge based on the violation of Section 56-5-2953(A).because a complete tape was not produced. The Supreme Court did not address the issue of exigent circumstances because the circuit court did not address it. In State v. Landis, *supra*, the court of Appeals held that when a statute's language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning.

In reading Section 56-5-2953 as a whole, the language is clear that the video recording at the breath test site is meant to include the sound as well as the video portion.

ARGUMENT

2.

Under the totality of the circumstances and the affidavit submitted by Deputy Evett who administered the breath test, the trial court was correct in not admitting the video recording, evidence concerning the breath test, and the results of the breath test.

Deputy Evett testified that he was not the arresting officer but only responded to the call when summoned by Lt. Woodward at the traffic stop. ROA. 18, ll. 14 – 25; ROA. 27, ll. 16 – 17. However, he was the officer who wrote and signed the affidavit required by Section 56-5-2953 (B). ROA. 64, ll. 14 – 19.

Defense counsel argued that the statute required that the affidavit be sworn to by the arresting officer:

Section 56-5-2953(B) of the South Carolina Code (Supp. 2006) requires the officer to produce the videotape or submit an affidavit explaining the failure to produce the videotape. It reads:

(B) Nothing in this section may be construed as prohibiting the introduction of other 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 videotapes 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 videotape equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating 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 videotape because the person needed emergency medical treatment, or exigent circumstances existed. . . . Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape 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 videotape.

S.C. Code Ann. § 56-5-2953(B) (Supp. 2006).

The statute is clear that the arresting officer is the person to submit the affidavit if the video cannot be produced. Therefore, according to the ruling in City of Rock Hill v. Suchenski, *supra*, the charge could have been dismissed because the Supreme Court said that 59-5-2953 provides for a dismissal of the charges when the statute was inexcusably violated.

The trial judge ruled that there was no exigent circumstance in Sawyer's case which the state relied on as the statutory exception for admission of just the video portion of the tape. Exigent circumstances are defined in BLACK'S LAW DICTIONARY, Sixth Edition, as situations that demand unusual or immediate action such as circumstances where police action must be "now or never" to preserve the evidence.

Section 59-5-2953(D) provides that SLED is responsible for monitoring all breath test sites to ensure the proper maintenance of video recording equipment. Agent Baker with SLED testified that he generally inspected each breath alcohol testing device once a quarter or every twelve weeks. He said they also try to inspect the video recording device at the same time. ROA. 34, ll. 19 – 25; ROA. 35, ll. 1 – 12. Then he testified that he learned of the problem with the equipment roughly one week before this hearing. When he researched the problem he testified that there was a problem with the equipment for about four months. ROA. 42, ll. 16 – 25; ROA. 78, ll. 11 – 25.

One of the exceptions in the statute was if the arresting officer included in his affidavit that reasonable efforts were made to maintain the equipment in an operable condition. The trial judge ruled that there had not been a showing of sufficient maintenance for the system and not a showing of sufficient review of the tapes once they were done. ROA. 82, ll. 2 – 20. The judge at the end of the hearing on April 15, 2008, and in his final Order dated October 5, 2008, found that exigent

circumstances did not exist because those require immediate attention. ROA. 82, ll. 21 – 25; ROA. 83, ll. 1 – 7.

The Supreme Court found in the Suchenski, *supra*, case, that under Section 56-5-2953, a violation of the statute with no mention of prejudice, may result in dismissal of the charges.

The trial judge correctly suppressed the video recording and the results from it because the state did not comply with Section 56-5-2953. The video was not complete because there was no sound. The affidavit was not submitted by the arresting officer. No exception applied as there were no exigent circumstances since the equipment had had a problem for four months, and there had been insufficient efforts to maintain the equipment.

CONCLUSION

Based on the above, the order of the trial court should be affirmed.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant".

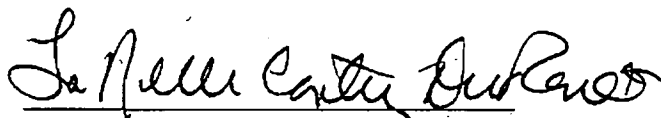
LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 29th day of October, 2009.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."


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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Judge

THE STATE,

APPELLANT,

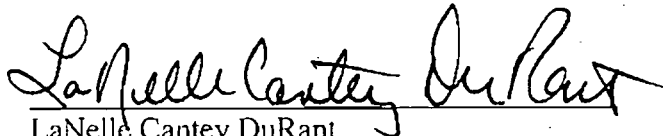
V.

PHILLIP SAWYER,

RESPONDENT

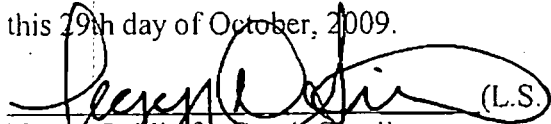
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Respondent in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 29th day of October, 2009.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 29th day of October, 2009.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.