

The Supreme Court of South Carolina

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June 14, 2013

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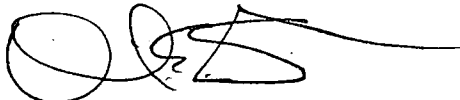
REMITTITUR

Re: State v. Justin Elwell - Appellate Case No. 2012-209726
Lower Court Case No. 2009GS1200121

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,



CLERK

cc: Douglas A. Barfield, Jr., Esquire
Michael Langford Brown, Jr., Esquire
Heath Preston Taylor, Esquire
The Honorable Brooks P. Goldsmith

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Justin Elwell, Petitioner.

Appellate Case No. 2012-209726

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Chester County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 27259
Heard April 4, 2013 – Filed May 29, 2013

AFFIRMED

Michael Langford Brown, Jr., of Rock Hill, and Heath
Preston Taylor of Taylor Law Firm, LLC, of West
Columbia, for Petitioner.

Solicitor Douglas A. Barfield, Jr., of Lancaster, for
Respondent.

CHIEF JUSTICE TOAL: This case is one of two¹ heard by the Court that presents the question of whether a pre-breath test videotape recording is required upon an arrest for driving under the influence (DUI) if the arrestee refuses the breath test. At both trials, the trial court dismissed the DUI charges, finding that the arresting officers did not comply with section 56-5-2953(A)(2)(d) of the South Carolina Code by failing to videotape a twenty-minute pre-test waiting period. See S.C. Code Ann. § 56-5-2953(A)(2)(d) (2006). The same panel of the court of appeals affirmed Ryan Hercheck's dismissal, but reversed Justin Elwell's dismissal seven months later. Elwell appeals the reversal of the dismissal in his case, and the State appeals the dismissal of Hercheck's case. With respect to Elwell's case, we affirm.

FACTS/PROCEDURAL BACKGROUND

On January 3, 2009, Elwell was arrested and indicted for driving under the influence (DUI), 2nd offense, in Chester County. On that date, Elwell was taken to a breath test site, where the arresting officer informed Elwell that he was being videotaped, delivered *Miranda*² warnings, and requested Elwell submit to a breath test, but also informed him of his right to refuse the test. All of these actions were videotaped. Elwell refused the test, which was also videotaped, but the arresting officer turned off the video recording equipment after Elwell refused the test but before twenty minutes had elapsed.

On December 2, 2009, this case proceeded to trial in the circuit court. During a pre-trial hearing, the circuit court dismissed the case, finding the arresting officer did not comply with section 56-5-2953 of the South Carolina Code by turning off the videotape recording after Elwell refused the breath test but prior to the expiration of the twenty minute waiting period.

The State appealed. Relevant to this appeal, the court of appeals held that subsection 56-5-2953(A)(2)(d) does not require the videotape to include a twenty-minute waiting period if an arrestee refuses to submit to the breath test. *State v. Elwell*, 396 S.C. 330, 333, 721 S.E.2d 451, 452 (Ct. App. 2011).

¹ The other case *State v. Hercheck*, Op. No. 27258 (S.C. Sup. Ct. filed May 29, 2013) (Shearhouse Adv. Sh. No. 24 at 46), was heard by the Court immediately preceding this case.

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

Elwell now appeals, and this Court granted his petition for writ of certiorari to resolve the discrepancy in outcomes between this case and *State v. Hercheck*.

ISSUE

Whether section 56-5-2953(A)(2)(d) requires law enforcement officers to videotape a twenty-minute pre-test waiting period when the arrestee refuses to take a breath test?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Therefore, this Court is bound by the trial court's factual findings unless the appellant can demonstrate that the trial court's conclusions either lack evidentiary support or are controlled by an error of law. *State v. Laney*, 367 S.C. 639, 644, 627 S.E.2d 726, 729 (2006).

ANALYSIS

Pursuant to section 56-5-2953(A), any person arrested for DUI "must have his conduct at the incident site and the breath test site videotaped." S.C. Code Ann. § 56-5-2953(A) (2006).³ To this end, there are certain requirements that must be met, one of which is that the videotape "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 video-tape this waiting period . . . [h]owever, if the arresting officer administers the breath test, the person's conduct during the twenty-minute pre-test waiting period must be videotaped." *Id.* at § 56-5-2953(A)(2)(d).⁴ The breath test site videotape must

³ Because Elwell was arrested prior to the enactment of the 2008 amendments (effective February 10, 2009) to this section, we decide this case under the 2006 version of the statute.

⁴ The current provision is codified at 56-5-2953(A)(2)(c), and reads: "The video recording at the breath test site 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 video record this waiting period." See S.C. Code Ann. § 56-5-2953(A)(2)(c) (Supp. 2012).

also: (1) be completed within three hours of the person's arrest or a probable cause determination, unless compliance is impossible because the person requires emergency medical treatment; (2) "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; and (3) "must include the person taking or refusing the breath test and the actions of the breath test operator while the conducting the test." S.C. Code Ann. § 56-5-2953(A)(2)(a)-(c) (2006).⁵

The court of appeals based its decision to reverse the trial court on the plain language of subsection 56-5-2953(A)(2)(d), which requires the videotape to include the arrestee's conduct "during the *required* twenty-minute *pre-test* waiting period." *Elwell*, 396 S.C. at 334, 721 S.E.2d at 453 (quoting S.C. Code Ann. § 56-5-2953(A)(2)(d)) (emphasis in original). It is the use of the words "required" and "pre-test" that the court of appeals focused on to "limit the application of the subsection:"

First, the use of "pretest" indicates the entire waiting period must precede a breath test. Second, the use of "required" indicates the waiting period must be videotaped only if the waiting period itself is required.

Id. As to whether the waiting period is "required," the court focused on the analysis contained in the implied consent cases decided prior to the codification of the subsection at issue, *State v. Parker*, 271 S.C. 159, 245 S.E.2d 904 (1978) and *State v. Jansen*, 305 S.C. 320, 408 S.E.2d 235 (1991).⁶ *Id.* at 334-35, 721 S.E.2d

⁵ The current provision deletes the three-hour requirement and the requirement for videotaping the reading of the Miranda rights (which is now included as part of the incident site videotape requirements). See S.C. Code Ann. § 56-5-2953(A)(2)(a)-(b) (Supp. 2012).

⁶ In *Parker*, this Court announced a test for laying a breath test foundation:

Prior to admitting such evidence, the State may be required to prove (1) that the machine was in proper working order at the time of the test; (2) that the correct chemicals had been used; (3) that the accused was not allowed to put anything in his mouth for 20 minutes prior to the test[;] and (4) that the test was administered by a qualified person in the proper manner.

at 453–54. Finding that the General Assembly enacted subsection 56-5-2953(A)(2)(d) in 1998 with the implied consent statute in mind, the court of appeals found that the phrase "required twenty-minute pre-test waiting period" was directly linked to the reasoning of *Parker* and *Jansen*, and consequently, where a "breath test is refused, the twenty-minute waiting period is not required and therefore, need not be videotaped." *Id.* at 335, 721 S.E.2d at 453–54.

The court of appeals further found its reading to be consistent with the legislative purpose behind the requirement, stating "[h]ere, the primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence." *Elwell*, 396 S.C. at 336, 721 S.E.2d at 454 (footnote omitted). Therefore, "the statute ensures the attempt to establish the breath test's reliability need not endure such swearing contests" and when a breath test is given, "the waiting period's videotaping provides evidence that helps resolve credibility disputes as to the procedure used in administering the breath test." *Id.* However, where no breath test is given, the court of appeals found "none of those credibility disputes will arise." *Id.* Finally the court reasoned:

The statute must be interpreted with realistic circumstances and rationales in mind, and this interpretation follows that approach. *See State v. Baker*, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."). Our interpretation does not require a police officer to turn off the video recorder after the person refuses to take the test, nor does it frustrate the statute's general requirement that a person arrested for DUI "have his conduct at . . . the breath test site videotaped." § 56-5-2953(A). In all cases, the videotape must still include the person being informed he is being videotaped, being informed he may refuse the test, and refusing the breath test if he in fact does so. *See S.C.*

Parker at 163, 245 S.E.2d at 906. In *Jansen*, the Court held that the State was not required to abide by the waiting period requirement in implied consent cases when a suspect refuses to take a breath test, stating "[T]he *Parker* precautions are intended to ensure that the results of the breathalyzer test if given are accurate and reliable as evidence at trial," and therefore, the precautions were futile if no test was administered. *Jansen*, at 322, 408 S.E.2d at 237.

Code Ann. § 56-5-2953(A)(2)(b)-(c) (Supp. 2007). Accordingly, if a person refuses to take the breath test, dismissal of a DUI charge is not warranted for the failure to videotape the person's conduct for twenty minutes so long as the other requirements of subsection 56-5-2953 (A)(2) are satisfied.

Id. at 336-37, 721 S.E.2d at 454 (footnote omitted).

The State argues that section 56-5-2953(A)(2)(d) does not require a law enforcement officer to videotape the entire twenty-minute pre-test waiting period once the arrestee refuses a breath test. Elwell argues that his case is simple, in that the videotape was produced, it was incomplete and therefore the statute was violated. Moreover, Elwell interprets the statute's repeated reference to "conduct" to mean that the State is required to videotape *all* conduct, not just pre-test conduct, for the full twenty minutes. We disagree.

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Scott*, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). Therefore, "[i]f a statute's language is plain, unambiguous, and conveys a clear meaning 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" *Id.* (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)); *see also State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("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." (citing *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002))). However, penal statutes will be strictly construed against the state. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citation omitted).

In our opinion, the inclusion of the term "pre-test" plainly requires a breath test be administered for the video requirement to apply, and if there is no test, the statute does not require a videotape. Otherwise, the legislature would not have included the "pre-test" modifier. *See, e.g., Breeden v. TCW, Inc./Tennessee Exp.*, 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003) (stating "[e]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any

reasonable construction." (citation omitted)); *Davenport v. City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993) ("It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning." (citation omitted)); cf. *Pittman*, 373 S.C. at 561, 647 S.E.2d at 161 ("Whenever possible, legislative intent should be found in the plain language of the statute itself." (citation omitted)). Moreover, we agree with the *Elwell* court's interpretation concerning the inclusion the term "required" in the statute. The court of appeals correctly and reasonably interpreted the pre-codification *Parker* and *Jansen* decisions to interpret the statute, concluding that only when the waiting period is required can the videotape recording also be required. On the other hand, if no test is administered, then the waiting period is rendered unnecessary, and so then is the videotape recording of that waiting period.

Furthermore, we agree with the court of appeals' analysis concerning the legislative purpose behind the videotape requirements. In *Roberts*, this Court stated that "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). Once an arrestee refuses the breath test, the evidence gathering portion is over. As a consequence, we agree with the State that once *Elwell* refused the test and no breath test was administered, the statute did not require the arresting officer to continue to videotape the twenty-minute pre-test waiting period, and therefore, the videotape produced at trial complied with the statutory requirements. To require otherwise, would result in the officer having to undergo a useless and absurd act. See *Leviner v. S.C. Dep't of Highways and Pub. Transp.*, 313 S.C. 409, 412, 438 S.E.2d 246, 248 (1993) ("[I]t is unreasonable to expect an arresting officer to consider a refusal as conditional so that he must remain near the arrested person for an extended period of time. The arresting officer would be required to forsake other duties to arrange for a belated test that the motorist had already refused after receiving warnings of the consequences of his noncompliance." (footnote omitted)).

Elwell argues that the remedy for the State's noncompliance is provided in *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007). *Suchenski* is inapplicable under the present facts. In that case, the respondent was arrested for DUI and was later indicted for DUAC (driving with an unlawful alcohol concentration). *Suchenski*, 374 S.C. at 14, 646 S.E.2d at 879. At the incident site, the arresting officer's video equipment malfunctioned, and the respondent moved to dismiss the charges based on the officer's failure to provide a "complete"

videotape from the incident site. *Id.* The municipality argued that the case should not have been dismissed. *Id.* at 16, 646 S.E.2d at 880-81. The Court found that "[u]nder § 56-5-2953, a violation of the statute, with no mention of prejudice, may result in dismissal of the charges." *Id.* at 16, 646 S.E.2d at 881. Therefore, Elwell argues that in the present case, where a complete videotape was not produced, the Court should uphold the dismissal of the charges due to the State's violation of the statute. We agree that the proper remedy in this case for failure to comply with the statutory requirements elucidated in section 56-5-2953 would be dismissal. However, because no statutory violation occurred in this case, we need not rely on *Suchenski* for a remedy here.

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Justin Elwell, Respondent.

Appeal From Chester County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 4912
Heard September 13, 2011 – Filed November 23, 2011

REVERSED AND REMANDED

Solicitor Douglas A. Barfield, Jr., of Lancaster, for
Appellant.

Michael Langford Brown, Jr., of Rock Hill, for
Respondent.

THOMAS, J.: The State appeals the dismissal of the charge against Justin Elwell for driving under the influence of alcohol (DUI), second offense. The State argues the trial court erred in holding the State failed to comply with subsection 56-5-2953(A)(2)(d) of the South Carolina Code (Supp. 2007) by turning off a breath test video-recorder after Elwell refused to take the test and before the expiration of twenty minutes. We reverse and remand for trial.

FACTS & PROCEDURAL HISTORY

On January 3, 2009,^[1] Elwell was arrested for DUI and subsequently taken to a breath-testing site. While there, the arresting officer informed Elwell that he was being videotaped, gave Elwell his Miranda^[2] rights, and asked Elwell if he would submit to a breath test. Elwell refused the test, affirming that he understood his driver's license would be suspended as a result. The officer turned off the video recorder after Elwell's refusal and before twenty minutes had elapsed.

Elwell was subsequently indicted for DUI, second offense. During a pretrial hearing, he moved to dismiss the charge because his conduct at the breath-testing site was not videotaped for the entire "twenty-minute pre-test waiting period," which he alleged is mandated in all situations covered by subsection 56-5-2953(A)(2)(d). The State argued dismissal was not appropriate

for two reasons. First, the waiting period is not required under that subsection when a person refuses to submit to a breath test. Second, subsection 56-5-2953(B) permits the trial court to excuse the failure to produce the mandated videotape for other "valid reasons," and a person's refusal to take the test constitutes a valid reason.

The trial court granted Elwell's motion to dismiss the charge, holding a suspect must be videotaped for twenty minutes even when the suspect refuses to take a breath test. The court also made a summary assertion that "none of the exceptions [under subsection 56-5-2953(B)] apply" to the case at hand. This appeal followed.

ISSUES ON APPEAL

1. Did the State comply with subsection 56-5-2953(A)(2)(d)?
2. If the State did not comply with subsection 56-5-2953(A)(2)(d), was Elwell's refusal to take the breath test a "valid reason" to turn off the video recorder under subsection 56-5-2953(B)?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Winkler, 388 S.C. 574, 582, 698 S.E.2d 596, 600 (2010) (internal quotation marks omitted).

I. Subsection 56-5-2953(A)(2)(d)

The State argues the trial court erred in holding the State failed to comply with subsection 56-5-2953(A)(2)(d) because the statute does not require the videotape to include a twenty-minute waiting period when a suspect refuses to take a breath test.^[3] We agree.

Under our principles of statutory construction, the court must "look to the plain language of the statute" to determine its meaning. State v. Branham, 392 S.C. 225, 231, 708 S.E.2d 806, 810 (Ct. App. 2011). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (citation and internal quotation marks omitted). "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." Id. at 351, 688 S.E.2d at 575.

"Our appellate courts have strictly construed section 56-5-2953" Town of Mount Pleasant v. Roberts, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011). Pursuant to that statute, a person arrested for DUI "must have his conduct at . . . the breath test site videotaped." S.C. Code Ann. § 56-5-2953(A) (Supp. 2007). "The videotaping at the breath site . . . must include the person taking or refusing the breath test" S.C. Code Ann. § 56-5-2953(A)(2)(c) (Supp. 2007).

As for the provision in issue, subsection 56-5-2953(A)(2)(d) says the videotape must include a suspect's conduct "during the required twenty-minute pre-test waiting period." S.C. Code Ann. § 56-5-2953(A)(2)(d) (Supp. 2007) (emphases added). The use of these two modifiers, "required" and "pre-test," limits the application of the subsection. First, the use of "pre-test" indicates the entire waiting period must precede a breath test. Second, the use of "required"

indicates the waiting period must be videotaped only if the waiting period itself is required. Whether the waiting period is required can be traced to two implied consent cases.

In State v. Parker, 271 S.C. 159, 245 S.E.2d 904 (1978), our supreme court fashioned a four-part test for laying a breath test foundation:

Prior to admitting such evidence, the State may be required to prove (1) that the machine was in proper working order at the time of the test; (2) that the correct chemicals had been used; (3) that the accused was not allowed to put anything in his mouth for 20 minutes prior to the test[;] and (4) that the test was administered by a qualified person in the proper manner.

Id. at 163, 245 S.E.2d at 906. In State v. Jansen, 305 S.C. 320, 408 S.E.2d 235 (1991), the court held the State need not comply with the waiting period requirement in implied consent cases when a suspect refuses to take a breath test. Id. at 322, 408 S.E.2d at 237. The court reasoned, "[T]he Parker precautions are intended to ensure that the results of the breathalyzer test if given are accurate and reliable as evidence at trial," and the precautions are pointless when the test is not given. Id.

Although Parker and Jansen involved the implied consent statute, no provisions in subsection 56-5-2953(A)(2)(d) other than the waiting period provision are modified by the term "required." Further, subsection 56-5-2953(A)(2)(d) was promulgated in 1998 and written with the implied consent statute in mind. See S.C. Code Ann. § 56-5-2950(a) (Supp. 1997) ("The arresting officer may not administer the [breath, blood, or urine] tests."), amended by S.C. Code Ann. § 56-5-2950(a) (Supp. 1998) ("The arresting officer may administer the [breath] test[] if the person's conduct during the twenty-minute pre-test waiting period is videotaped pursuant to [subs]ection 56-5-2953(A)(2)(d):"). Thus, we believe subsection 56-5-2953(A)(2)(d)'s phrase "required twenty-minute pre-test waiting period" is a direct reference to Parker and Jansen.^[4] When the breath test is refused, the twenty-minute waiting period is not required and, therefore, need not be videotaped.^[5]

This reading of the statute is consistent with the legislature's intent. Generally, "[t]he legislature is presumed to intend that its statutes accomplish something." State v. Long, 363 S.C. 360, 364, 610 S.E.2d 809, 811 (2005). Here, the primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence.^[6] As it relates to the waiting period, the statute ensures the attempt to establish the breath test's reliability need not endure such swearing contests. If a breath test is administered, the waiting period's videotaping provides evidence that helps resolve credibility disputes as to the procedure used in administering the breath test. Cf. Jansen, 305 S.C. at 322, 408 S.E.2d at 237 ("[T]he Parker precautions are intended to insure that the results of the breathalyzer test if given are accurate and reliable as evidence at trial."). If the breath test is not administered, none of those credibility disputes will arise.

The statute must be interpreted with realistic circumstances and rationales in mind, and this interpretation follows that approach. See State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."). Our interpretation does not require a police officer to turn off the video recorder after the person refuses to take the test, nor does it frustrate the statute's general requirement that a person arrested for DUI "have

his conduct at . . . the breath test site videotaped." § 56-5-2953(A). In all cases, the videotape must still include the person being informed he is being videotaped, being informed he may refuse the test, and refusing the breath test if he in fact does so.^[7] See S.C. Code Ann. § 56-5-2953(A)(2)(b)-(c) (Supp. 2007). Accordingly, if a person refuses to take the breath test, dismissal of a DUI charge is not warranted for the failure to videotape the person's conduct for twenty minutes so long as the other requirements of subsection 56-5-2953(A)(2) are satisfied. The trial court erred in dismissing Elwell's DUI charge.

II. Subsection 56-5-2953(B)

As an alternative to its first argument, the State contends Elwell's refusal to consent to the breath test was a "valid reason" to stop videotaping the waiting period under subsection 56-5-2953(B). However, because we reverse on the above issue, we need not address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

CONCLUSION

For the aforementioned reasons, we reverse the trial court's dismissal of the DUI charge against Elwell and remand for trial.

REVERSED AND REMANDED.

FEW, C.J., and KONDUROS, J., concur.

[1] An amended videotape statute became effective after Elwell's arrest. See S.C. Code Ann. § 56-5-2953 (Supp. 2010) (effective February 10, 2009).

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

[3] During oral argument, the State sought to supplement the record with a DVD of the breath test to prove Elwell was videotaped for twenty minutes. Defense counsel objected. This court did not rule on the motion, and the State did not follow-up with a written motion. In any event, both parties agreed during oral argument that the court could access an online version of the video using information properly included in the record. The record included an internet link, username, and password to access the video, and the court has reviewed the online video. However, whether the videotape in fact depicts the entire waiting period is unpreserved. The State did not contest that issue before the trial court, and its oral argument before this court was the first time the issue was raised. See State v. Carmack, 388 S.C. 190, 200, 694 S.E.2d 224, 229 (Ct. App. 2010) ("[F]or an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

[4] Our conclusion that the above phrase refers to the parameters established by Parker and Jansen is also supported by considering the effect of omitting the term "required" from the statute. If the statute did not include "required," it would provide as follows: "The videotaping at the breath site . . . must also include the person's conduct during the twenty-minute pre-test waiting period." Under such a version of the statute, the "must also include" language would

itself mandate the waiting period be videotaped, and the term "required" would be unnecessary. We will not interpret the statute to include such a redundancy. See Sweat, 386 S.C. at 351, 688 S.E.2d at 575 ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." (citation and internal question marks omitted)).

[5] As a whole, subsection 56-5-2953(A)(2)(d) provides the following:

The videotaping at the breath site . . . 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.

The subsection establishes when the waiting period must be videotaped, and it limits when an affidavit may be introduced in lieu of the videotape. If the waiting period's videotaping was required but was physically impossible, an affidavit to that effect may be introduced. However, the affidavit may not be introduced in lieu of a videotape if the arresting officer administered the breath test. The current version of subsection 56-5-2953(A)(2) does not preclude the arresting officer from using the affidavit when the arresting officer administered the breath test. See S.C. Code Ann. § 56-5-2953(A)(2)(c) (Supp. 2010) ("The video recording at the breath test site 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 video record this waiting period.").

[6] The introductory sentence of subsection 56-5-2953(A) frames the rest of the subsection's provisions, stating "[a] person [arrested for DUI] must have his conduct at the incident site and the breath test site videotaped." § 56-5-2953(A). The statute protects both the State and the defendant from sometimes unreliable memories of those testifying during trial.

[7] The amended version of subsection 56-5-2953(A)(2) removes the requirement that the videotape include the reading of Miranda rights. Compare S.C. Code Ann. § 56-5-2953(A)(2) (Supp. 2007), with S.C. Code Ann. § 56-5-2953(A)(2) (Supp. 2010). However, that alteration does not affect our interpretation of the statute's waiting period videotape requirement.