

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
The Court of Common Pleas

Ned Miller, Circuit Court Judge

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Case No: 2013-CP-23-00284

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The State,

Respondent.

v.

Wilmond Vincent Mathis,

Appellant.

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INITIAL BRIEF OF APPELLANT

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**Table of Contents**

Table of Contents.....1

Table of Authorities.....2

Statement of the Issues on Appeal.....3

Statement of The Case.....4

Argument.....4

Conclusion.....7

**Table of Authorities**

Cases

City of Rock Hill v. Suchenski, 646 S.E.2d 879 (S.C. 2007).....6  
State v. Castineira, 341 S.C. 619, 625-26 (Ct. App. 2000).....5  
State v. Leopard, 359 S.C. 467, 470-71 (Ct. App. 2002).....5

Statutes

S.C. Code § 56-5-2953.....4, 5, 6

Other Authorities

State v. Irby 2011-CP-24-593 Order of Dismissal (Eighth Judicial Circuit).....6  
FreeDictionary.Com.....5

**Statement of the Issue on Appeal**

1. Whether the trial court erred in failing to dismiss a charge of DUI based on the state's failure to video record the roadside footage, specifically in failing to capture audio of any field sobriety tests and failure to capture audio of the Miranda warnings thus failing to comply with the plain language of S.C. Code 56-5-2953.

## Statement of the Case

The defendant was charged with Driving Under the Influence in violation of S.C. Code 56-5-2930. He was arrested on January 22, 2012 by Greenville County Deputy S. Cook. (Traffic Ticket p. 1) This case was heard by jury trial on January 10, 2013 before The Honorable Darrell Fisher, Greenville County Magistrate. Prior to the start of the case the defendant submitted a motion to dismiss that was heard and denied by The Court. The motion was based on a violation of S.C. Code 56-5-2953 for violation of the recording procedure at the incident site. (Transcript of Defendant's Motion p1-4.) The defendant was subsequently convicted and the conviction was upheld by the Circuit Court. (Circuit Court Order p. 1).

This appeal follows.

### Argument

1. **The court erred in failing to dismiss the charge based on the State's failure to video record the incident site, specifically failing to capture audio of the defendant's field sobriety tests and failing to capture audio of the defendant being read his Miranda rights pursuant to S.C. Code § 56-5-2953.**

Pursuant to S.C. Code § 56-5-2953(A) the defendant must have his conduct at the incident site and the breath test site video recorded. More specifically under S.C. Code § 56-5-2953(A)(1)(a) the video recording at the incident site must (i) not begin later than the activation of the officer's blue lights; (ii) include any field sobriety tests administered; and (iii) include the arrest of a person for a violation of Section 56-5-2953 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2953, and show the person being advised of his *Miranda* rights.

The video recording produced by the State contains no audio of the field sobriety tests, including any and all instructions given by the officer and any and all responses by the defendant. Further, the video contains no audio of the Miranda rights. After the defendant is arrested and placed into the police car, only then is audio available and the defendant and officer are heard in conversation during transport to the police station. In response to the defendant's motion to dismiss, the state conceded that the officer's body microphone was inactive at the time the stop occurs. The officer never provided an affidavit or evidence to justify his failure to comply with the recording requirements under Subpart (A)(1)(a). In the Magistrate's return the Court found that the video was provided, without audio, but that the video was sufficient for trial.

The defendant submits that while a video of the incident site was produced, it violated the plain language of the statute by failing to include any audio portion during the field sobriety tests and Miranda rights; thereby rendering said video incomplete. The officer failed to provide any sworn affidavit as required for excusal from the statutory requirements. The magistrate denied the defendant's motion to dismiss for violation of the video recording requirement.

Although video recording is not defined by the statute, it is the defendant's position that the plain language of video recording in the modern era includes both visual and audio components. The Free Dictionary.com defines video recording as: "a recording of both the visual and audible components". Additionally, in State v. Castineira, 341 S.C. 619, 625-26 (Ct. App. 2000) this court found that "criminal statutes must be strictly construed against the State and in favor of the defendant. In State v. Leopard, 359 S.C. 467, 470-71 (Ct. App. 2002) this court found that "when the terms of a statute are clear

and unambiguous, the Court must apply them according to their literal meaning.” The statute requires any field sobriety tests administered to be video recorded as well as showing the defendant being advised of his Miranda rights. Legislative intent suggests that the defendant’s conduct be video recorded in an effort to ascertain the defendant’s sobriety for purposes of the finder of fact during trial, including audio and visual observations. In a non-binding Order of Dismissal in the Eighth Judicial Circuit of South Carolina, the Honorable Frank R. Addy, Jr. provides “...the Court finds that Mr. Irby was prejudiced because of lack of audio on the incident site videotape. A defendant’s verbal responses are often as important in the defense of a DUI case as the defendant’s physical actions. The lack of audio prevented (the defendant) Mr. Irby from presenting potentially exculpatory evidence and presenting a full and complete defense as contemplated by Code Section 56-5-2953.” (Defendant’s Exhibit 1 Eighth Judicial Circuit Order of Dismissal pg. 4 and 5.)

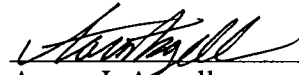
Whilst the above referenced Eighth Circuit Order is not binding on this Honorable Court, the defendant would submit that City of Rock Hill v. Suchenski is both applicable and controlling, however. In Suchenski, the defendant was charged with driving with an unlawful alcohol concentration (DUAC). Pursuant to S.C. Code §56-5-2953(A) the recording applies to both DUI and DUAC charges. The arresting officer was unable to produce a complete roadside video due to a reported equipment malfunction. The Court found that “failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal if no exceptions apply” and that the statute “provides for dismissal of charges when the statute is inexcusably violated.” Suchenski at 880 and 881. In Suchenski, the South Carolina Supreme Court upheld a Circuit Court

Judge's decision reversing the conviction where there was a failure to produce a complete video. In the case at hand, the State has violated subsection (A)(1) by failing to produce a complete video recording to include the audio portion of field sobriety tests and the Miranda warnings and failing to establish any exception pursuant to Section 56-5-2953 (B) which requires at a minimum an affidavit of non-compliance. The statute was inexcusably violated and the proper remedy is dismissal. The Magistrate erred by denying the defendants motion for relief. The defendant therefore prays for a reversal of his conviction and a dismissal of the charge against him.

**Conclusion**

Based on the foregoing, the defendant is entitled to a reversal of his conviction.

Respectfully Submitted,



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