THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking No. 2012-212643

The State, ... Appellant

v.

Woodrow Mozee, ... Respondent

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Trooper Turner arrested Respondent for driving under the influence (DUI) and an open container violation on January 8, 2011. Respondent proceeded to trial before the Honorable Ronald C. Halfacre, Magistrate in Newberry County. Respondent was represented by Pete G. Diamaduros and the State was represented by Assistant Solicitor Rosemerry Felder-Commander. Respondent was convicted of both charges on July 15, 2011.

Respondent filed an appeal to the Court of Common Pleas on July 27, 2011. The Honorable Eugene C. Griffith, Jr., heard the appeal on March 12, 2012. The parties were represented by the same two attorneys.

After hearing arguments and taking the matter under advisement to review the audio and videotapes, Judge Eugene C. Griffith, Jr. vacated Respondent's conviction and dismissed the charges against Respondent by Order filed April 20, 2012. The State filed it's Notice of Appeal from this Order on May 15, 2012.

ARGUMENT

I. The Circuit Court Judge properly overturned the conviction and dismissed the case based upon the fact that the videotape produced in court did not comply with Section 56-5-2953 of the South Carolina Code

The Circuit Court correctly found that the State failed to produce a complete videotape and failed to comply with the provisions of Section 56-5-2953 of the South Carolina Code. Appellant would have this Court believe that the Circuit Court improperly added requirements to Code Section 56-5-2953(A). In its initial brief, Appellant emphasizes the portion of Section 56-5-2953(A)(1)(a)(i) "not beginning later than the activation of the officer's blue lights". Respondent would agree that the section makes no reference to the video recording having to begin immediately upon the officer's seeing a violation. Respondent would disagree with Appellant when Appellant asserts that the section would not require the video recording upon the officer manually turning on the camera. The clear, unambiguous language of the statute would lead a reasonable person to understand the intent of the statute and the intent of the statute would require that any recording whether manually activated or automatically triggered upon activation of the officer's blue lights would need to be captured by videotape and provided to Respondent in discovery in order to afford him the opportunity to prepare an adequate defense..

The videotape provided did not record until the blue lights were activated. The officer testified that he manually activated the video to capture alleged conduct of Respondant utilized by the officer in determining probable cause. However,the officer subsequently became aware that the portion of critical evidence of conduct was not collected because the manual activation of the video failed or was delayed. The officer failed to account for this lack of video by affidavit or otherwise. In this case the officer elected to activate the video and made the conscious decision to press the button or flip the switch for manual recording. At this time the failure to provide the videotape that he attempted to record triggers the Affidavit provisions of 56-5-2953(B). The proper procedure would have been for the trooper to submit an affidavit indicating that his camera malfunctioned and did not capture the conduct that he attempted to capture. No such affidavit was submitted and dismissal was therefore warranted under *City of Rock Hill vs. Suchenski*, 374 SC 12, 646 SE2d 8779 (2007).

The cardinal rule of statutory construction is that a court must ascertain and give effect to the intent of the legislature. *State vs. Scott* 351 SC 584, 588, 571 SE2d 700, 702 (2002) (Citing *Charleston County Sch. Dist. vs. State Budget and Control Bd.*, 313 SC1, 437, SE2d 6 (1993).

All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. A

statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself.

State vs. Pittman, 373 SC 527, 561, 647, SE2d 144, 161 (2007).

"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 vs. Dupree* 354 SC 676, 693, 583 SC2d 437, 446)(Ct. App. 2003)

The language of Section 56-5-2953 is clear and unambiguous. It mandates the video recording at the incident site to "not begin later than the activation of the officer's blue lights" 56-5-2953(A) (1)(a)(I).

However, whenever a video is made or attempted to be made, it must be accounted for. Section 56-5-2953 (B) states that "failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to 56-5-2930 .... if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination .... was in an inoperable condition ....". In this case no affidavit was prepared by the officer.

Appellant refers in its brief to an "absurd result". Under the circumstances of this case the absurd result would be one whereby an officer manually activates his camera to gather evidence critical to his determination of probable cause of impairment prior to initiating a stop with the blue light, subsequently discovering that evidence was not captured due to equipment malfunction and then arguing that none of the evidence, whether incriminating or exculpatory, has to be provided to the Defendant because the statute does not require it to be provided. *Unisun Insurance Company vs. Schmidt*, 339 SC 362, 368, 529 SE2d 280, 283 (2000)(Finding courts will reject an interpretation of the statute leading to an absurd result clearly unintended by the legislature) *State vs. Elwell*, 396 SC 330, 336, 721 SE2d 451, 454 (Ct. App. 2011) (The statute must be interpreted with realistic circumstances and rationales in mind).

The Circuit Court clearly interpreted the statute as intended by the legislature and with a rational mind. The Court found the language to be plain, unambiguous and conveying a clear meaning, that meaning being that the legislature intended the manually recorded video evidence to be produced and not to just be testified to or written about in reports. The failure of the trooper to produce this VIDEO OR AN AFFIDAVIT REQUIRED BY 56-5-2953(B) (supp 2011) violated the statute and the Circuit Court Judge correctly overturned the conviction and dismissed the case.

"Our Appellate Courts have strictly construed Section 56-5-2953 and found that a law enforcement agency's failure to comply with these provisions is fatal to the prosecution of a DUI case." *Town of Mt. Pleasant vs. Robert* 393 SC 332, 346, 713 SE2d 278, 285 (2011) (citing *City of Rock Hill vs. Suchenski*, 374 SC 12, 17, 646, SE2d 879, 881 (2007) (holding that "dismissal of a DUAC charge is an appropriate remedy provided by Section 56-5-2953 when a violation of subsection (A) is not mitigated by subsection (B) exceptions"); (*Murphy vs. State* 392 SC 626, 630 709 SE2d 685, 687)(Ct. App. 2011) (recognizing the State's noncompliance with Section 56-5-2953, which is not mitigated by a statutory exception, warrants dismissal)). "The legislature clearly intended for a *per se* dismissal in the event that a law enforcement agency violated the mandatory provisions of Section 56-5-2953." *Id. at 348, 713 SE2d at 286.*

II. The Circuit Court Judge property dismissed the case based upon the Trooper marking the breath test as a refusal when in fact it was an incomplete test under Section 56-5-2950 of the South Carolina Code and SLED Policy 8.12.5.L.2.f VII (2009)

The Circuit Court properly found that Trooper Turner violated SLED policy when he marked Respondent's test as a refusal.

Testimony in the record revealed that Respondent attempted to provide a proper

breath sample once the machine gave the beep tone indicating it was time for the Respondent to blow. Testimony in the record revealed that Respondent attempted three separate blows of approximately 12 seconds, approximately 14 seconds, and approximately 10 seconds respectively. Respondent adamantly told Trooper Turner that he was not refusing and had blown all he could. Just as in the case of *Krystal Chisolm v. SCDMV*, 402 SC 593, 741, SE2d 42, (SC. App. 2013), in the case at hand there was a steady tone while Respondent blew on three separate attempts. Just as in *Chisolm*, the Magistrate, as the hearing officer in *Chisolm*, found that Respondent and *Chisolm* refused the breath test because no result registered.

The SLED policy at issue in this case is 8.12.5(L)(2)(f)(vii) (2009). This SLED policy states "A "NO" should only be entered if the subject failed to provide an acceptable breath sample if there was no fault of his/her own". That policy does allow the trooper the option to mark this type situation as an incomplete test and to repeat the test which he chose not to do.

"Regulations authorized by the legislature have the force of law. *Faile v. SC Employment Security Commission* 267 SC 536, 230 SC 2nd 219 (1976). Although a regulations has the force of law, it may not alter or add to a statute." *James G. Goodman v. City of Columbia* 318 SC 488, 458 SE 2d 531 (S.C. 1995) . In this case we

are dealing with policies, but they need to have the force of law.

In *Chisolm* at page 47, this Court stated "We start with the proposition that when the breath test instrument emits a steady tone, the steady tone is an indication that the instrument is receiving a breath sample." This Court went on to discuss the approach taken in other jurisdictions for guidance. Just as in *Chisolm*, a review of the record in this case and the video recording would reveal that the Respondent wanted to take the breath test, blew into the DataMaster and the instrument produced a steady tone for an extended period of time that would indicate to a reasonable person that sufficient air was going into the instrument. In this case, Trooper Turner did testify extensively regarding his "belief" that Respondent was not trying to blow and was trying to avoid the test. Trooper Turner also testified and had notes indicating that the defendant was elderly, was carrying an inhaler and that he believed the defendant was unable to give a sufficient sample. This opinion held by the Trooper cannot override the video evidence and the recorded evidence in this case. A steady tone can be heard for three separate attempts ranging from 10 to 14 seconds. This would indicate that the Respondent was doing what he was suppose to do and that he was blowing into the instrument and not sucking from the instrument. The decision of Trooper Turner to mark this set of circumstances as a refusal is arbitrary and capricious and an abuse of his discretion. In *Chisolm* at page 50,

this Court stated that "the instrument's failure to register a test report in and of itself, absent some other facts, does not end the inquiry in determining whether the subject refused the breath test". The Court further stated " We find it fundamentally unfair under the facts herein to label as a refusal a situation where Chisolm blew for such an extended length of time with a steady tone by the instrument, absent any allegations of fault by Chisolm or any attempt to fake or thwart the test".

The Appellant would have this Court find that the trooper's abuse of discretion in this case should be overlooked due to what Appellant believes is overwhelming evidence of the Respondent's intoxication. The most insulting thing that one human can do to another is call him a liar. In this case, the trooper was in essence calling Respondent a liar by telling him that he was sucking in when, in fact, Respondent was blowing into the datamaster, as evidenced by the "steady tone". The trooper incorrectly categorized statements made by Respondent during the testing process as "verbal attacks and rants". However, Respondent's statements clearly illustrate his disgust with indignation with the trooper calling him a liar and stating that the Respondent was not doing the simple tasks that he was being asked to do.

Section 56-5-2950 (J) provides for an exclusion of any evidence of the alleged refusal when policies, procedures and regulations promulgated by SLED are not

followed, and such failure materially affects the fairness of the procedure. In the instant case the lower court allowed the evidence even though the Trooper abused his discretion by categorizing Respondent's attempt as a refusal rather than an incomplete test, and thus failing to follow the appropriate incomplete test procedure . This should lead to a dismissal of the charge. Respondent was prejudiced, and the fairness of the procedure was materially affected because Respondent was deemed a fair and accurate Datamaster blow that could have provided Respondent exculpatory evidence of his sobriety.

III. The Circuit Court Judge properly overturned the conviction for the ABC violation for an open container based upon the violation of South Carolina Highway Patrol Policy

The Circuit Court properly vacated Respondent's conviction for the ABC violation for an open container.

As stated by Appellant, Trooper Turner located what **appeared** to be an open container of liquor. The trooper placed the bottle in front of a camera and described it on camera. Appellant states that the Respondent never disputed whether the contents were alcohol.

By pleading not guilty and going to trial on the issue, Appellant did dispute that the contents were alcohol. The State in a criminal case is required to prove every element of

any crime beyond every reasonable doubt. One element would be that the contents of the container were alcohol, not that the container appeared to be an alcoholic container, and contained a liquid with sufficient alcohol to make it illegal to carry in an open container. A container of O'Doul's non-alcoholic beer, by appearance and smell, could be mistakely identified as an alcoholic beverage.

The Circuit Court properly found that South Carolina Highway Patrol policy 300-15 requires that any alcoholic beverage seized should be placed in an evidence bag and sealed with evidence tape and stored until trial. The trooper failed to comply with policy in this case.

The Circuit Court properly overturned the trial court conviction based upon the Magistrate allowing the Trooper to speculate that the liquid contained alcohol.

Since Respondent did not know that the container of liquid was in his jacket, he could not truthfully testify as to the contents. The legislature authorizes agencies to formulate policies to uniformly, efficiently and fairly implement the application of law.

The State doesn't attempt to convict someone of possessing drugs or other contraband without following their evidence policies and analyzing drugs for what they appear to be. We can only assume that different agencies and departments organized and existing in the State of South Carolina have policies and procedures for a purpose. Drug

analysis would be one, the alcohol in this case would be another, chain of custody policies and procedures would be others. What the State is saying in this case is that what the policy says does not matter. So all State agency policies are not relevant which would include SLED policies, DHEC policies, DSS policies, Highway Patrol policies. Why would the state have policies and why would time br taken to write them if they are not going to be followed? The purpose of a policy such as the one in this case would be so that the officer is not giving an opinion that he would not be qualified to give under Rule 701.

"Regulations authorized by the legislature have the force of law. *Faile v. SC Employment Security Commission* 267 SC 536, 230 SC 2nd 219 (1976). Although a regulations has the force of law, it may not alter or add to a statute." *James G. Goodman v. City of Columbia* 318 SC 488, 458 SE 2d 531 (S.C. 1995) . In this case we are dealing with policies, but they need to have the force of law. Some guidance is found in tort law where courts have ruled that policies can be used to establish standards of care. The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a Defendant's own policies and guidelines. See *Steinke v. SC Dept. of Labor, Licensing and Regulation* 336 SC 373, 387-89, 520 SE2d 142, 149-50 (1999). *Tindell v. Columbia Ry., Gas & Elec. Co.,* 109 SC 34,

95 SE 109 (1918) stated that relevant rules of a Defendant are admissible in evidence in a personal injury action regardless of whether rules were intended primarily for employee guidance, public safety, or because violation of such rules may constitute evidence of a breach of the duty of care and the proximate cause of injury. *Caldwell v. K-Mart Corp.*, 306 SC 27, 31 - 32, 410 SE2d 21, 24 (Ct. App. 1991) stated that when Defendant adopts internal policies or self-imposed rules and therefore violates these policies or rules, jury may consider such violations as evidence of negligence if they proximately cause a Plaintiff's damages.

By violating the Highway Patrol policy 300-15, the Trooper should not have been allowed to testify about a smell of alcohol that he could not and did not store or have tested. Without being able to testify that the liquid contained a percentage of alcohol by volume, an element of the statute allegedly violated by the Respondent would be missing and a directed verdict should have been granted. Therefore, this Court should affirm the ruling of the Circuit Court and dismiss the charge of the ABC violation against the Respondent.

CONCLUSION

For all the foregoing reasons, it is respectively submitted that the decision of the Circuit Court in vacating Respondent's convictions and dismissing the charges against him should be sustained.

Respectfully submitted

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July 24, 2013

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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PROOF OF SERVICE

I, Pete G. Diamaduros, certify that I have served the within Initial Brief of Respondent on Appellant by depositing two copies of the same in the United States Mail, postage prepaid, addressed to:

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I further certify all parties required by rule to be served have been served this 24 day of July, 2013.

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