STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	COURT OF COMMON PLEAS BEAUFORT COUNTY
SOUTH CAROLINA vs. Curtis A. Green Defendant.	CASE NO: 2023-CP-07-01673 **ORDER VACATING DISMISSAL OF DUI CHARGE AND REMANDING TO THE BEAUFORT COUNTY MAGISTRATE COURT FOR FURTHER PROCEEDINGS** (Appeal Dismissed)

THIS MATTER came before me by way of the State of South Carolina's appeal from the Magistrate's dismissal of the Respondent's driving under the influence (hereinafter "DUI") charge. On appeal, the State argues that the Magistrate erred in dismissing the charge because 1) the State provided a statutory compliant video pursuant to S.C. Code Ann. § 56-5-2953(A) when the video(s) capture both the arresting officer and the Respondent/Defendant, Curtis Green (hereinafter "Respondent"), during the administration of the horizontal gaze nystagmus test (hereinafter "HGN"), and 2) if the Magistrate found the video was of such poor quality it rendered its admission more prejudicial than probative, then suppression, not dismissal is the appropriate remedy. Oral argument was held on December 11, 2023. Present at the hearing was Brian C. Kiel, attorney for the State, and H. Fred Kuhn, Jr., attorney for Respondent. For the reasons set forth below, the dismissal of the DUI charge is hereby vacated, and the case is remanded to the Beaufort County Magistrate Court for further proceedings.

STATEMENT OF FACTS

On or about September 16, 2020, Beaufort County Sheriff's Deputy, Doug Armstead (hereinafter "Deputy Armstead") conducted a traffic stop at Ice House Road and Parris Island Gateway on a vehicle driven by Respondent for failing to use his turn signal. While speaking with Respondent, Deputy Armstead smelled alcohol coming from his person. Beaufort County Sheriff's Deputy, Christian Anderson (hereinafter "Deputy Anderson") arrived as backup and assumed the DUI investigation.

Deputy Anderson asked Respondent to perform Standardized Field Sobriety Test (hereinafter "SFST's"). Deputy Anderson ultimately arrested Defendant for DUI based on the traffic infraction, the smell of alcohol, and the performance of SFST's. The entire traffic stop, DUI investigation, and arrest were all captured on video as required by S.C. Code Ann. § 56-5-2953.

Respondent moved to dismiss his DUI charge on the grounds the video did not comply with S.C. Code Ann. § 56-5-2953 because the administration of the HGN test, specifically, the face and eyes were not captured on either dash or body camera. In response, the State argued that the video(s) complied with S.C. Code Ann. § 56-5-2953 in that the administration of the field sobriety test, specifically the HGN test, was adequately captured. A hearing was held before the magistrate court. The Magistrate granted Respondent's motion to dismiss, finding that while Deputy Anderson's "body camera and vehicle dashboard[,] camera are clear and intact," the Respondent's eyes are not shown during the HGN test preventing the results of which to be determined. Respondent argued, and the magistrate court agreed, that a defective incident site video of any sort deprives the Respondent of potential exculpatory evidence, and therefore dismissed the case.

The State appealed to the circuit court, arguing subsection 56-5-2953(A)'s statutory requirement that the administration of the HGN field sobriety test be video recorded was satisfied. The State further argued that if the Court found the video was of such poor quality that it rendered its admission more prejudicial than probative, the remedy would not be dismissal but suppression of the HGN administration.

STANDARD OF REVIEW

"In criminal appeals from magistrate or municipal court, the circuit court does not conduct a de novo review, but instead reviews for preserved error raised to it by appropriate exception." State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 681, 682 (Ct. App. 2001).

DISCUSSION

The State submits the magistrate court erred in finding that the State failed to produce a compliant video pursuant to S.C. Code Ann. § 56-5-2953 due to the video failing to capture "the Defendant's face in general and eyes in particular." S.C. Code Ann. § 56-5-2953(A) requires the following:

> (A) A person who violates Section 56–5–2930, 56–5–2933, or 56–5–2945 must have his conduct at the incident site and breath test site video recorded.
>
> (1)(a) The video recording at the incident site must:
>
> (i) not begin later than the activation of the officer's blue lights;
>
> (ii) *include any field sobriety tests administered*; and
>
> (iii) include the arrest of a person for violation of Section 56–5–2930 or Section 56–5–2933, or a probable cause determination in that the person violated Section 56–5–2945, and show the person being advised of his Miranda rights.

S.C. Code Ann. § 56–5–2953(A) (Supp.2011) (emphasis added).

Specific to the test at issue here, "common sense dictates that the head must be visible on the video" when performing the HGN test. State v. Gordon, 414 S.C. 94, 777 S.E.2d 376 (2015). In Gordon, the Court noted that it was undisputed that the Defendant's face was depicted in the video, and it is axiomatic that the face is part of the head. Id. Similarly, in State v. Walters, the South Carolina Court of Appeals reversed the lower court dismissal finding that the State Trooper's administration of the HGN test was compliant pursuant to S.C. Code § 56-5-2953. State v. Walters, 418 S.C. 303, 307, 792 S.E.2d 251, 254. In Walters, the South Carolina State Trooper positioned Walters with his back facing the dash cam prior to administering the HGN field sobriety test. Id. at 306, 792 S.E.2d at 253. The Court of

Appeals found the video recording properly captured the administration of the field sobriety test. Id. Specifically, the Court of Appeals found:

> Walters head [was] visible during the entire recording of the HGN test. In addition, Trooper McAdam's arm is visible as he administers the test, and his instructions are audible. While Trooper McAdam's finger disappears at times during the test as his hand moves in front of Walter's face, the Statute does not require video recordings of the HGN test to include views of all angles of the test. Such a requirement would be unreasonable given the limitations of dashboard cameras.

Id. at 306, 792 S.E.2d at 253.

"Until recently, dismissal of a DUI charge was an appropriate remedy if a police officer failed to produce a video in compliance with the statute unless an exception applied. State v. Lowery, 436 S.C. 349, 360–61, 872 S.E.2d 197, 203 (Ct. App. 2022), reh'g denied (May 18, 2022), cert. granted (Aug. 10, 2023). Citing, City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007) (explaining dismissal as a proper remedy and noting exceptions that excuse compliance with section 56-5-2953(A) are provided in section 56-5-2953(B)); State v. Taylor, 436 S.C. 28, 870 S.E.2d 168 (2022), (per se dismissal improper for violation of the statute as to Miranda warnings).

After hearing arguments from both the State and Defense, reviewing the Magistrate's return, and all evidence submitted in this case, this Court agrees with the Magistrate Court's finding that the video recording does not capture the Defendant's face nor eyes. However, this Court finds the Magistrate Court erred in dismissing this matter in its entirety. Instead, this Court finds the appropriate remedy is to suppress the HGN test. State v. Gordon, 414 S.C. 94, 777 S.E.2d 376 (2015).

Additionally, the Defendant argues that this matter should be dismissed because the State's failure to capture both the face and eyes results in a failure by the State to preserve additional evidence. However, Defendant's argument places additional burdens not contemplated by S.C. Code Ann 56-5-2953(A). See, State v. Gordon, 414 S.C. 94, 101, 777 S.E.2d 376 (2015) (noting that the "eyes of the

motorist are rarely, if ever, seen."). Furthermore, the State does not have an absolute duty to preserve potentially useful evidence that may exonerate a defendant. State v. Cheeseboro, 346 S.C. 526. 552 S.E.2d 300 (2001) (requiring evidence to be destroyed in bad faith, or that destroyed evidence exculpatory value was apparent prior to destruction and the defendant cannot obtain comparable evidence of value by other means).

As such, this Court declines the Defendant's invitation to impose additional burdens on the State not contemplated by the plain language of S.C. Code 56-5-2953(A) nor will it require the State to preserve any and all potentially useful evidence in a matter. Therefore, the Court finds Defendant's argument is without merit.

CONCLUSION

Accordingly, and for the reasons set forth above, IT IS THERERORE ORDERED that the Magistrate's dismissal of the DUI charge is hereby vacated, and Respondent's DUI charge is remanded to the Beaufort County Magistrate Court for further proceedings consistent with the findings in this Order.

AND IT IS SO ORDERED!

Marvin H. Dukes, III
Presiding Judge, Fourteenth Judicial Circuit

_____, 2023.
Beaufort, South Carolina

Beaufort Common Pleas

Case Caption: State Of South Carolina VS Curtis A Green

Case Number: 2023CP0701673

Type: Order/Vacate Judgment

So Ordered:

s/Marvin H. Dukes III #3069