

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM CHESTER COUNTY
Court of General Sessions

S.C. Supreme Court

Brooks Goldsmith, Circuit Court Judge

Opinion No. 4912 (S.C. Ct. App., Filed Nov. 23, 2011)

THE STATE.....Respondent

v.

JUSTIN ELWELL.....Petitioner

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Brooks Goldsmith, Circuit Court Judge

The State, Appellant.

v.

Justin Elwell Respondent.

RECORD ON APPEAL

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WITNESSES

LK Guempel (State Highway Patrol)

J. B. Knox

ARREST WARRANT NUMBER/DOA

D384408

1/3/2009

ACTION OF GRAND JURY

TRUEBILL

Charles Snyder
Foreperson of Grand Jury
Date: *3-31-09*

VERDICT

Foreperson of Petit Jury
Date:
INDICT

DOCKET NO. 2009-GS-12-121

**The State of South Carolina
County of Chester**

COURT OF GENERAL SESSIONS

March TERM 2009

THE STATE

vs.

JUSTIN WAYNE ELWELL

Indictment for

Driving under the influence - 2nd offense

SC Code: 56-05-2930
CDR Code: 3369
Class: A (Misdemeanor)

Dismissed
MM [Signature]
Brooks Goldsmith
December 3 2009

This is a correct copy of original paper
on which this entry
is based.
[Signature]
Clerk of Court
Chester County, SC
Date: *12-3-09*

1 MR. DAVIS: Your Honor, this is on the record in the
2 matter of state versus Justin Elwell it's 2009-GS-12-121.
3 It's a true billed indictment for a DUI second, Your Honor.
4 We had basically a legal briefing on each side in this case
5 and we are ready to proceed with our hearing today. The
6 State has made -- or the defense has made a motion to
7 basically dismiss the case based upon a statutory violation
8 that they allege has occurred in 56-5-2953, Subsection A.
9 I can let the defense state it, but basically their motion
10 is that the case should be dismissed because in this case
11 we had a refusal and their argument is that the 20 minute
12 pre-test waiting period was not established as 2953
13 requires. Of course, the State's argument is that -- as we
14 will brief, Your Honor, based on the case law that we don't
15 think that -- well, really there's two arguments. One is
16 that there is case law that the Supreme Court has issued
17 that would say that the statute is not overturned, and also
18 we argue that the statute is not violated. We also argue
19 that the statute is not violated in this situation because
20 it is a refusal and not a testing situation. I think that
21 is where we're at in the case and what the State is going
22 to do is call its witness and put on the record the
23 evidence in regard to that particular motion.

24 THE COURT: All right.

25 MR. DAVIS: Your Honor, we are going to call Lee

1 Kenneth Gumble to the stand.

2 The witness, LEE KENNETH GUMPLE, was first duly sworn

3 And testified as follows, on:

4 DIRECT EXAMINATION

5 BY MR. DAVIS:

6 Q Would you please state your name for the record?

7 A My name is Lee Kenneth Gumble.

8 Q Tell us where you're employed.

9 A I'm employed with the South Carolina Highway Patrol.

10 Q How long have you been with the patrol?

11 A Over 21 years.

12 Q And you're trained in DUI law enforcement?

13 A That is correct.

14 Q And let's take directly to an incident that occurred,
15 the defendant is Justin Elwell, I think the arrest date is
16 January 3, 2009. In regards to -- you made an arrest for
17 a DUI on Justin Elwell; is that correct?

18 A Yes, sir.

19 Q And in that arrest you had an opportunity to offer
20 him a datamaster test.

21 A Yes, sir.

22 Q And tell us what you do in offering a datamaster
23 test.

24 A First of all I am certified through the Criminal
25 Justice Academy in combination with Sled to be a

1 datamaster operator, and I have my card here.

2 Q And you're certified at the time of this offering of
3 this test?

4 A Correct.

5 Q Given that -- well, let's just --

6 MR. DAVIS: And I can -- Your Honor, I don't believe
7 there was -- the defense has any dispute as to the
8 particular procedures in this case but I will go ahead and
9 have him outline the procedures that he used and we will
10 get to the issue that the defense has made its motion on
11 unless there's any objection. In other words, I want to
12 make sure -- I want to get directly to the issue, I don't
13 think there's any other argument other than that the -- in
14 2953 that the 20 minute period pre-test waiting period
15 that's discussed in 2953 is the only argument the defense
16 has -- is really making about this case.

17 THE COURT: Right.

18 MR. DAVIS: All right. Go ahead.

19 THE COURT: Apparently Mr. Brown agrees with that
20 statement.

21 MR. BROWN: That's correct, Your Honor.

22 Q And you have a copy of the test report and the
23 advisement of the implied consent rights?

24 A Yes, I do.

25 MR. DAVIS: Your Honor, what I want to do is I'm

1 going -- just going to mark for the purposes of this
2 hearing the advisement of rights consent and the breath
3 alcohol analysis report that Trooper Gumble has a copy of.
4 I'm going to also mark in evidence this datamaster video
5 which actually is a recording of the datamaster incident.
6 I don't think there's any objection from the defense as I
7 understand about any of these exhibits. I will offer them
8 as State's Exhibits for the purposes of this hearing.

9 THE COURT: All right, without objection.

10 Q I'm going to show you what has been labeled as
11 State's Exhibit 2 and State's Exhibit Number 3 and also
12 State's Exhibit 1. Just briefly when you give a
13 datamaster test one of the steps is that you videotape the
14 datamaster; is that correct?

15 A That is correct.

16 Q And State's Exhibit Number 1 there, that's a copy of
17 the datamaster that was actually downloaded from the Sled
18 website?

19 A Yes, sir.

20 Q As you're trained in procedure, tell us how you
21 conduct the datamaster test in regards to -- specifically
22 in regard to the 20 minute waiting period.

23 A Okay. At this time under the law we inform them of
24 the video recording -- it is actually not a videotape,
25 it's a digital recording -- advise them that they are

1 being video recorded. I apologize for my voice. They are
2 advised that Miranda -- he was advised of his Miranda
3 rights and informed that he was going to be asked to give
4 a breast test or datamaster test. And then I did give him
5 a copy of the advisement of implied consent rights, which
6 is our procedure, and he did sign for that copy at the
7 bottom. Then I read it to him and made sure that he
8 understood it and then I asked if he had any questions
9 about the form and he really did not.

10 Q At the very beginning it says in this document, the
11 implied consent rights form, you tell him on the video
12 that he's being videotaped; is that correct?

13 A Yes.

14 Q Normally there is a time stamp at the beginning
15 stating what time it began but on this one it doesn't have
16 one. Can you explain to us --

17 A That's correct. I asked him if he wanted to take the
18 datamaster test and he indicated to me that he did not. I
19 asked him if he understood what that would mean and he
20 said that he did. He told me at least three times that he
21 did not want to take the test, so under my training I
22 accepted that as a verbal refusal and then I entered the
23 ticket into the machine and entered the information as far
24 as time of arrest, defendant's name, my name, all of that
25 identifying information. And then that is printed out and

1 he was given a copy of that which he also signed for,
2 which is State's Exhibit 3, breath alcohol analysis
3 report, he signed that along with myself. And also he was
4 given a notice of suspension form for the DMV, since he
5 refused the test his license would be suspended.

6 Q And you can correct me, but basically on that video
7 you advised him that he is being videotaped, Mirandized
8 him, read him this advisement?

9 A Yes, sir.

10 Q He also got a copy of it in writing?

11 A Yes, sir, he signed for it.

12 Q And then you ask him if he wants to the take the test
13 and he says basically -- on the video he says no, I don't
14 want to take the test.

15 A Yes.

16 Q And if you look at the I believe it's State's Exhibit
17 3, the test report.

18 A Yes.

19 Q You do a refusal and stamp on there 5:23, is that the
20 approximate time?

21 A Yes, sir.

22 Q When you go to datamaster school so to speak at the
23 academy, do they train you in refusal situations, what you
24 do and the circumstances you would face and then what to
25 do in those circumstances?

1 A Yes, sir, we are allowed to accept --

2 MR. BROWN: Your Honor, I'm going to object to that,
3 what is the relevance?

4 MR. DAVIS: Your Honor, he's a trained datamaster
5 operator and I'm basically asking him about the basis of
6 his training and how he operates the datamaster based upon
7 the regulations and training that he gets as a datamaster
8 operator, I think that's relevant to why he would -- in
9 this specific case why a refusal situation he can stop the
10 test once a refusal is given.

11 THE COURT: I'll go ahead and hear it, overruled.

12 Q In the academy do they teach you or at least when you
13 got through the datamaster training do they teach you what
14 to do in a refusal situation?

15 A Yes, sir. And there is a couple types of refusals.
16 One is they verbally tell you, "I'm not going to take the
17 test," and they can do that, we can't make you take it.
18 Or another way they can refuse the test is they get up
19 there, they say they want to take it, they get up there
20 and they do not provide a proper air sample or another way
21 they can refuse the test is they fight with us in the
22 booking area and we can't get them in the datamaster room.
23 So under those two circumstances, they verbally refuse or
24 if they fight with us and get violent then we're not going
25 to have an observation period because it's not required.

1 Q Is the test given when someone refuses?

2 A No, sir. No test is given if you refuse to take it.

3 Q And based on his reaction to when -- you testified
4 that approximately three times you think he told you that
5 he did not want to take it?

6 A I believe so, it was more than one. I asked him
7 again and made sure that he understood that he would lose
8 his license and he didn't take it.

9 MR. DAVIS: That's all I have for this witness.

10 Please answer any questions the defense may have.

11 CROSS EXAMINATION

12 BY MR. BROWN:

13 Q Gumble?

14 A Gumble.

15 Q I apologize if I mispronounce it. Sergeant Gumble,
16 you are familiar with the breath test procedure; is that
17 correct?

18 A Yes, sir.

19 Q And part of the procedure is checking the mouth; is
20 that correct?

21 A If you're going to proceed with the test but not if
22 it is a refusal, no, sir.

23 Q That's what -- I'm not asking you if it is a refusal
24 or not, I'm asking you as part of the breath test
25 procedure is checking the mouth part of the breast test

1 procedure?

2 A Well, sir, it depends. If the procedure is they
3 verbally refuse then no it's not. If they are going to
4 take the test --

5 Q Let's say at this point in time you don't know what
6 they're going to do and you are setting the machine up, is
7 that part of the procedure, yes or no?

8 A Yes, sir, if they're going to take the test.

9 Q And time stamp is part of the procedure, is it not?

10 A If the test is going to be given.

11 MR. DAVIS: Your Honor I am going to object to this
12 only because I specifically -- in my direct examination I
13 specifically asked the defense -- in other words, the only
14 challenge the defense is making is to 2953, the 20 minute
15 pre-test waiting period has been violated. If he wants
16 to -- the officer has gone over what he did in the
17 datamaster room but it appears that he's going to attack
18 him on some other issues in the case which actually have
19 not been -- which have not been a part of his motion. In
20 the pretrial motion hearing I addressed the exact motion
21 that the defense had. If he's going to make a motion
22 regarding the observation period I don't see that -- in
23 other words, it's not part of his motion, his motion is
24 just in regards to the 20 minute pre-test waiting period
25 not being fulfilled. And I just don't think -- that line

1 of questioning is not relevant, we're not at trial and at
2 cross examination where those issues might be in play, this
3 is only a hearing. If he wants to expand his motion he can
4 do so, but this hearing is regarding the 2953 argument
5 under the statute that the defense is making and I would
6 argue that that's just not -- at this time it's not
7 relevant to this motion hearing.

8 THE COURT: I understand the objection, overruled.
9 You may proceed.

10 MR. BROWN: Your Honor, just for the record I am
11 moving under 2953 Subsection A2, B and C. As the solicitor
12 so amply stated earlier this motion is under 56-5-2953.

13 Q A 20 minute observation period after the time stamped
14 and checking of the mouth is done, it's part of breath
15 test procedure; is that correct?

16 A If a test is given, yes, sir.

17 Q That's not my question. It's part of breast test
18 procedure.

19 A Sir, it is if the test is given but not for refusal.

20 Q And I understand you're beating that dead horse, but
21 we're talking about a scenario here where the person
22 hadn't refused.

23 A Yes, sir, that's correct. If they haven't refused
24 that's part of the procedure.

25 Q And that wasn't done here, was it?

1 A No, sir, because he refused.

2 Q And there was no 20 minute videotaping of the
3 pre-test waiting period, was there?

4 A No, sir. There was no waiting period because he
5 refused.

6 Q And there was no 20 minute videotaping of his conduct
7 in the pre-test waiting period, was there?

8 A No, sir, because he refused.

9 MR. BROWN: That's all.

10 THE COURT: Anything further, Solicitor?

11 MR. BROWN: No further questions.

12 MR. DAVIS: No, sir, Your Honor.

13 THE COURT: You may step down. Anything further from
14 the State?

15 MR. DAVIS: No, sir.

16 THE COURT: Anything further from the defense?

17 MR. BROWN: Your Honor, unless the Court wants me to
18 rehash the argument.

19 THE COURT: I think for the record you need to flesh
20 it out a little bit.

21 MR. BROWN: Yes, sir. Your Honor, at this point in
22 time I would move pursuant to 56-5-2953, this case did
23 occur on January 3rd of 2009, it would be under the law in
24 effect until February 10, 2009. Pursuant to Subsection A2
25 B and C of that statute the videotaping at the breath site

1 must include the reading of the Miranda rights, the entire
2 breath test procedure, the person being informed that he is
3 being videotaped, and that he has a right to refuse the
4 test. C, must include the person taking or refusing the
5 breast test and the actual breath test operator while
6 conducting the test. And D, must also include a person's
7 conduct during the required 20 minute pre-test waiting
8 period unless the officer submits a sworn affidavit
9 certifying that it was physically impossible to videotape
10 his waiting period. However, if the arresting officer
11 administers a breath test the person's conduct during the
12 20 minute pre-test waiting period must be videotaped. Your
13 Honor, Subsection B, second sentence states that failure by
14 the arresting officer to produce a videotape required by
15 this section is not alone a ground for dismissal of any
16 charge made pursuant to section 56-5-2930, 56-5-2933, or
17 56-5-2945 if the arresting officer submits a sworn
18 affidavit certifying that the videotape equipment at the
19 time of the arrest, probable cause determination or breath
20 test device was in an inoperable condition stating
21 reasonable efforts had been made to maintain the equipment
22 in an operable condition, and certifying there was no other
23 operable breath test facility available in the county, or
24 in the alternative, submits a sworn affidavit certifying it
25 was physically impossible to produce a videotape because

1 the person needed emergency medical treatment or exigent
2 circumstances existed. Your Honor, for the record, under
3 Subsection B from what the State has offered it is my
4 understanding none of those circumstances existed. So now
5 we're down to the remedy for violation of this statute,
6 Your Honor. Under City of Rock Hill vs. Chinskey
7 (phonetically) 646 Southeast 2nd, 879 South Carolina 2007,
8 which is a case where the Mr. Chinskey was arrested for DUI
9 and later charged with DUAC, at the incident site the
10 arresting officer videotaped the conduct but the tape ran
11 out. We had two of the three field sobriety tests, we did
12 not have the last field sobriety test videotaped. In the
13 next to the last paragraph of that order the supreme court
14 stated under 56-5-2953 a violation of the statute with no
15 mention of prejudice may result in dismissal of the
16 charges. The statute provides failure by the arresting
17 officer to produce a videotape as required by this section
18 is not alone a grounds for dismissal of any charge made
19 pursuant to 56-5-2930, 2933 or 2945, if -- and the supreme
20 court put an emphasis on that if -- if exceptions apply. I
21 have enumerated the exceptions of the Subsection B, none of
22 them are applicable here, Your Honor. The supreme court
23 went onto state conversely, failure to produce videotapes
24 would be a ground for dismissal if no exceptions applied.
25 In this case, Your Honor, none of exceptions apply, the

1 remedy is dismissal and I would ask that the charges
2 against Mr. Elwell be dismissed pursuant to the violation
3 of 56-5-2953 and Chinskey.

4 THE COURT: Thank you, Mr. Brown.

5 MR. DAVIS: May it please the Court, Your Honor? Your
6 Honor, we have basically two arguments that rebuttal that.
7 We think that first, that the statute itself is not
8 violated, and the reason that I can argue that is that
9 under 2953 Subsection A2 that the -- that that subsection
10 specifically refers to a pre-test waiting period. And this
11 is a situation where a refusal is not a test and therefore
12 we would say that provision is not violated. Your Honor, I
13 believe that covers the -- as far as the testing procedure,
14 if that is the main argument of the statute that the test
15 procedure, we say it was a refusal and therefore that
16 particular subsection would not apply. Your Honor, we also
17 are relying on case law, State vs. Jansen -- I can hand up
18 a copy, I do have a copy, I can hand it up, Your Honor, but
19 I believe you've already reviewed it.

20 THE COURT: I read Jansen yesterday.

21 MR. DAVIS: And under Jansen basically in summation,
22 although it's a supreme court decision that's not what
23 overturned -- this particular statute does not specifically
24 do anything to overrule Jansen that in a refusal situation
25 basically. I would argue that in a refusal situation that

1 those particular procedures don't have to be followed in a
2 refusal situation. Your Honor, I would also cite to
3 56-5-2953 Subsection B, the last sentence which basically
4 says none of the other sections prevents the Court from
5 considering any other valid reason for the failure to
6 produce the video recording based upon the totality of the
7 circumstances, nor do the provisions of this section
8 prevent the solicitor's from offering evidence relating to
9 the arresting law enforcement officer's failure to produce
10 the videotape. We don't have a failure to produce, Your
11 Honor, but he's basically saying what should have been
12 produced is lower than what was produced. But still, Your
13 Honor, you're allowed to consider other valid reasons. And
14 Officer Gumpel testified to -- one thing he testified to
15 was his training as a datamaster operator and refusal
16 situations are considered the same as when a test is given,
17 that's how they are trained and how they operate the
18 datamaster and I think that's a valid reason to rely in a
19 refusal situation that 20 minute pre-test waiting period
20 does not have to be complied with. The only other response to
21 Chinskey, first of all, Your Honor, this case basically
22 says that there is an issue that was before the Court for
23 review and the Court could have ruled on it but since it
24 was not preserved it could not rule on it and that had to
25 do with exceptions, when videotaping was not in compliance

1 with the statute. So the Court didn't make a ruling on
2 that, the ruling was that it should have been reviewed. So
3 in that sense it does not become the precedent on -- at
4 least that ruling doesn't find anybody -- because it is
5 basically saying we can't make that decision because it is
6 not before us. And I think lastly Chinskey deals with
7 statutory violations that result in a dismissal. I think I
8 go back to my first argument which is the State is just
9 asserting that if you look at 2953 A2, when you have a
10 refusal situation that that statute does not specifically
11 address refusals, it addresses testing situations in that
12 this situation would not prohibit the officer from stopping
13 the procedure once a refusal is given. Thank you, Your
14 Honor.

15 MR. BROWN: Your Honor, if I may just briefly respond.
16 First off, Your Honor, as to his last argument I cite State
17 v. Dingle, 659 Southeast 2nd 101, whenever possible the
18 legislative intent should be founded in plain language of
19 the statute itself when the statute's language is plain and
20 unambiguous and conveys a clear and definite meaning the
21 rules of statutory interpretation are not needed and the
22 Court has no right to impose meaning. That statute makes
23 no exception under 2953 as to a refusal situation. It's an
24 all situation when someone is arrested in 2953, 2930, 2933
25 and 2935. I would also like to state for the record, Your

1 Honor, Jansen relies heavily on ex parte Horne, a 1990 and
2 a 1991 case before the supreme court. Ex Parte Horne was
3 my case. That case was tried in the actment of the blue
4 light and the DUI qualification in 1998 that required
5 videotaping and it is no longer applicable. Lastly, Your
6 Honor, his argument as to Chinskey and the State did not
7 make a 59B motion, I will quote that opinion: On appeal to
8 the circuit court the city reiterates its position that
9 non-compliance was excused pursuant to 56-5-2953B. That is
10 the exception part of 2953 as I read to the Court. The
11 State in this case has alleged no exceptions under
12 Subsection B, therefore that argument as to the supreme
13 court not reaching the issue is not before us here, it is
14 not even applicable.

15 THE COURT: I agree with the position of the defense
16 in this case and grant the defense' motion. It seems to
17 the Court that the Jansen case the 20 minutes had to do
18 with the validity of the tests, it appeared to me that the
19 statute that I have read either now or at the time of this
20 event, that the 20 minute time period is not merely for the
21 validity of the test, but in addition to but also includes
22 the conduct of the defendaant during a period of time. I
23 find that none of the exceptions apply, and I also find
24 that Chinskey -- that the statute contemplates that
25 dismissal is a remedy because it goes ahead and tells us

1 when dismissal is not a remedy in Chinskey. Therefore I
2 find that the appropriate remedy is dismissal and for those
3 reasons I grant the motion to dismiss.

4 (END OF THE HEARING.)

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ADVISEMENT OF IMPLIED CONSENT RIGHTS

JUSTIN WAYNE ELWELL

12-23-81

Subject's Name (Print)

Date of Birth

00



Driver's License Number

State Licensed

DRIVING UNDER THE INFLUENCE ADVISEMENT

- (A) Will test be video recorded? If answer is Yes, start here -> Inform subject of video recording. Advise subject of Miranda rights. If answer is No, start here -> Inform subject of the type (breath, blood, urine) samples requested.

(B) Then read the following advisement to subject:

- You are under arrest for Driving Under the Influence (DUI), Section 56-5-2930, South Carolina Code of Laws 1976, as amended. The arresting officer has directed that samples be taken for alcohol and/or drug testing. The samples will be taken and tested according to Section 56-5-2950 and SLED policies. You do not have to take the tests or give the samples, but if you refuse to submit to the tests, your privilege to drive in South Carolina must be suspended or denied for at least ninety (90) days and your refusal may be used against you in court. If you take the tests or give the samples and have an alcohol concentration of eight one-hundredths of one percent (0.08%) or more, you may instead be charged with Driving with an Unlawful Alcohol Concentration (DUAC), Section 56-5-2933. If you have an alcohol concentration of fifteen one-hundredths of one percent (0.15%) or more, your privilege to drive in South Carolina must be suspended for at least thirty (30) days. You have the right to have a qualified person of your own choosing conduct additional independent tests at your expense and the officer, upon request, must provide you affirmative assistance. You have the right to request an administrative hearing within thirty (30) days of the issuance of the notice of suspension. If you do not request an administrative hearing or if your suspension is upheld at the administrative hearing, you must enroll in an Alcohol and Drug Safety Action Program.

If applicable, perform the following procedures:

- (C) Check subject's mouth and remove any foreign material. (Not required if a refusal has occurred.) (D) Time stamp Breath Alcohol Analysis Test Report. (Not required if a refusal has occurred.) (E) Observe subject for a minimum of twenty (20) minutes before collecting breath sample. (Not required if a refusal has occurred.) (F) Enter biographical data into BAC DataMaster. (Required for all tests, including refusals.)

FELONY DRIVING UNDER THE INFLUENCE ADVISEMENT

- (B) Will test be video recorded? If answer is Yes, start here -> Inform subject of video recording. Advise subject of Miranda rights. If answer is No, start here -> Inform subject of the type (breath, blood, urine) samples requested.

(B) Then read the following advisement to subject:

- You are under arrest for Felony Driving Under the Influence (Felony DUI), Section 56-5-2945, South Carolina Code of Laws 1976, as amended, or a law enforcement officer has probable cause to believe that you have violated this section. The officer has directed that samples be taken for alcohol and/or drug testing. The samples will be taken and tested according to Section 56-5-2950 and SLED policies. Pursuant to Section 56-5-2946, you must submit to either one or a combination of chemical tests for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs. The resistance, obstruction, or opposition to testing pursuant to Section 56-5-2946 is evidence admissible at trial. If your tests or samples have an alcohol concentration of fifteen one-hundredths of one percent (0.15%) or more, your privilege to drive in South Carolina must be suspended for at least thirty (30) days. You have the right to have a qualified person of your own choosing conduct additional independent tests at your expense and the officer, upon request, must provide you affirmative assistance. You have the right to request an administrative hearing within thirty (30) days of the issuance of the notice of suspension. If you do not request an administrative hearing or if your suspension is upheld at the administrative hearing, you must enroll in an Alcohol and Drug Safety Action Program.

If applicable, perform the following procedures:

- (C) Check subject's mouth and remove any foreign material. (D) Time stamp Breath Alcohol Analysis Test Report. (E) Observe subject for a minimum of twenty (20) minutes before collecting breath sample. (F) Enter biographical data into BAC DataMaster.

LABEL -> STATES EXHIBIT 2



L.K. GUENDEL

Officer's Name (Print)

[Signature]

Subject's Signature (Received Copy)

[Signature]

Officer's Signature

1-3-2009

Date

0510

Time



South CAROLINA
LAW ENFORCEMENT DIVISION

Breath Alcohol Analysis Test Report

BAC DataMaster SERIAL # 881417

TICKET: D384408 COUNTY: 12
SIR NAME: JUSTIN W/ELMER

DRIVER'S LICENSE: SC/007044300
SEX: M RACE: W DOB: 12/23/81
ARREST DATE: 01/03/09 ARREST TIME: 03:50
ARRESTING OFFICER: L/K/GUEMPEL
AGENCY ORI: SC012SP00
TEST OPERATOR: L/K/GUEMPEL
AGENCY ORI: SC012SP00 CERT. #: DM002696
LOT #: 00003 BOTTLE #: 0555
SOLUTION EXPIRATION DATE: 02/10/10

BREATH ANALYSIS ----- TEST DATE 01/03/09

BLANK TEST	0.00%	05:20
INTERNAL STANDARD	VERIFIED	05:20
0.08% SIMULATOR TEMP	34c	05:20
0.08% SIMULATOR PASSED	0.079%	05:20
BLANK TEST	0.00%	05:21
SUBJECT SAMPLE	REFUSED	05:23
BLANK TEST	0.00%	05:23
INTERNAL STANDARD	VERIFIED	05:23

L K Guempel
TEST OPERATOR'S SIGNATURE

L K Guempel
ARRESTING OFFICER'S SIGNATURE

[Signature] 1-3-09
SUBJECT'S SIGNATURE (RECEIVED COPY)/DATE

VISIT WWW.SLED.SC.GOV AND CLICK ON "IMPLIED CONSENT" TO VIEW A VIDEO RECORDING OF THIS BREATH TEST. ENTER INFORMATION FROM THE BOX BELOW:

SUBJECT ID: 005652961B
SUBJECT PASSWORD: 48005

IMPORTANT NOTICE

INFORMATION FROM THIS REPORT WILL BE USED TO ACCESS THE BREATH TEST VIDEO. ANYONE WITH THIS INFORMATION WILL HAVE ACCESS. PROTECT THIS REPORT AS YOU WOULD ANY IMPORTANT DOCUMENT. SLED ASSUMES NO RESPONSIBILITY FOR UNAUTHORIZED ACCESS.

LABEL →

STATES EXHIBIT

3

ATTACHED TO BACK
OF TEST REPORT
ON ORIGINAL
DOCUMENT



DVD admitted by Trial Court , (R. p. 7, line 9), is filed with the Chester County Clerk of Courts office.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Brooks Goldsmith, Circuit Court Judge

Case No. 2009147367

The State, Appellant.

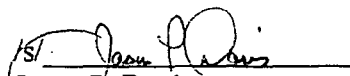
v.

Justin Elwell Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Record on Appeal complies with Rule 210, and contains all material proposed to be included by any of the parties and not any other material:

Date: 11 JUNE 2010


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Brooks Goldsmith, Circuit Court Judge

The State, Appellant.

v.

Justin Elwell, Respondent.

BRIEF OF APPELLANT

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Wiktionary, Online Dictionary, 2010. www.wiktionary.org7, 9

STATEMENT OF ISSUE ON APPEAL

1. DID THE TRIAL COURT ERR IN DISMISSING THE CASE BY FINDING THAT, AFTER THE DEFENDANT REFUSED TO TAKE THE DATAMASTER, THE ENTIRE BREATH TEST PROCEDURE WAS NOT FOLLOWED, AND THE REQUIRED TWENTY MINUTE PRETEST WAITING PERIOD WAS NOT VIDEOTAPED IN VIOLATION OF S.C. CODE ANN. 56-05-2953?

STATEMENT OF THE CASE

On December 2, 2009 a pretrial motion hearing was held on the issue of compliance with 56-05-2953 in the administration of a datamaster exam as part of a Driving Under the Influence arrest. This motion was based on an alleged failure to videotape “the entire breath test procedure,” and “the person’s conduct during the required twenty minute pretest waiting period.” (R. p. 14, line 21.). On December 2, 2009 The Honorable Judge Brooks Goldsmith ordered the case dismissed based on a violation of S.C. Code Ann. § 56-05-2953(A)(2). R. p. 20, line 15.). A notice of appeal was filed with all parties on December 2, 2009.

FACTS

On January 3, 2009 respondent was arrested for Driving Under the Influence and was offered a Datamaster exam. Arresting Trooper L.K. Guempel administered the exam. Trooper Guempel advised the Defendant in writing of his implied consent rights, and videotaped the defendant's verbal refusal to take the test. (R. p. 8, lines 10-25). Trooper Guempel did not time stamp the Breath Alcohol Test Report, and check the mouth of the defendant. After the Defendant's refusal, but prior to the eclipsing of the entire twenty (20) minute pretest waiting period, he terminated the exam and ended the video recording of the exam due to the Defendant's verbal refusal. (R. p. 9, lines 6-9.)

ARGUMENTS

I. THERE WAS NO VIOLATION OF S.C. CODE ANN. § 56-05-2953 AS A TEST WAS NOT GIVEN, AND THE ENTIRE BREATH TEST PROCEDURE WAS RECORDED.

A. Breath Test Procedure. There is not a dispute that a verbal refusal after advisement in writing was given in this case, however, the defense argues Trooper Guempel did not video record the time stamp, and the checking of the mouth, as he did not even perform these procedures. The statute requires that, “the video recording at the breath test site must: a) include the entire breath test procedure . . . “. S.C. Code Ann. 56-05-2953(A)(2)(a)(1976). The Statute itself does not define “breath test procedure.” The Court has held that the primary function in interpreting a statute is to ascertain the intent of the legislature. State v. Baker, 310 S.C. 510, 427 S.E.2d 670 (1993). “A Statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” Baker, at 512. Under existing Supreme Court caselaw, when a refusal is given, the procedure is limited to the reading of the advisement of implied consent rights, and furnishing the defendant with a copy in writing. No other protocol has to be followed in a refusal situation under State v. Jansen, 305 S.C. 320, 408 S.E.2d 235 (1991); State v. Parker, 271 S.C. 159, 245 S.E. 2d 904 (1978). It is important to note that the Statute is referring to “the” breath test procedure. The is a definite article that is referring to something presupposed. <http://en.wiktionary.org> (2010). The breath test procedure is not defined anywhere in the Statute. It is defined in S.L.E.D. (South Carolina Law

Enforcement Division) policy. S.L.E.D. is specifically given authority by the Legislature to “. . . administer the provisions of this subsection and must make regulations necessary to carry out its provisions.” 56-05-2950 (E)(2nd Paragraph). After advisement in writing, a verbal refusal ends a Datamaster exam. “A Subject may be removed from the testing site at any time after a refusal occurs. If a subject gives the test operator a refusal after the advisement process, the checking of the mouth and/or observation period may be waived.” S.L.E.D. policy 8.12.5(F)(1). The Statute requires, “the video recording of the breath test site must: . . . include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test . . .” SC Code Ann. 56-05-2953(A)(2)(b). Once a refusal is given, however, there is no longer a “pretest,” and it is the end of any “breath test procedures.” All of the breath test procedures have been fulfilled. A “test” has been precluded by refusal. There is no factual dispute that the defendant was read his advisement of implied consent rights, and a copy of those rights was provided to him in writing. He was informed he was being videotaped, and that he had a right to refuse the datamaster. He refused. It was videotaped. This ends all breath test procedures. *Jansen*, id. SLED Policy 8.12.5(F)(1).

B. Videotaping of Twenty Minute Pretest Waiting Period. The statute also requires that, “the video recording at the breath test site must: . . .also include the person’s conduct during the required twenty minute pretest waiting period . . .” Since a refusal was given by the defendant, there is not a “pretest waiting period,” that is to be recorded. This statutory language is in *reference* to the policy, and is

not *creating* a mandatory 20 minute waiting period in a non test situation. This is a logical inference from the plain construction of the statute as the statute uses the language “pretest.” A refusal is a termination of a test. This is directly noted in S.L.E.D. policy: “A subject may be removed from the testing site at any time after a refusal occurs. If a subject gives the test operator a refusal after the advisement process, checking of the mouth, time stamp, and/or observation period may be waived.” SLED Policy 8.12.5(F)(1). A refusal is defined in Black’s Law Dictionary as, “(1)The denial or rejection of something offered or demanded. (2) An opportunity to accept or reject something before it is offered to others; the right or privilege of having this opportunity.” Black’s Law Dictionary, 1285 (7th Edition, 1999). The Statute mandates the videotaping of “the required twenty minute pretest waiting period.” 56-05-2953(2)(c). The Statute is also written with the precursor “the” required twenty minute pretest waiting period. “The” is a definite article. The definition of “the” from Wiktionary states, “. . . that “the” implies necessarily that the entity it articulates is presupposed; something already mentioned, or completely specified later in the same sentence, or assumed already completely specified.” <http://en.wiktionary.org> (2010). The statute is clear. The breath test procedure, including the refusal, must be videotaped. 56-05-2953(A)(2)(c). This Statute does not *create* “the” mandatory twenty minute pretest waiting period in every situation. In fact, the Statute is referring to S.L.E.D. policy that requires a twenty minute waiting period before a test is administered. (emphasis added) S.L.E.D. Policy 8.12.5 (J). The only time, under

any existing law, where “the” required twenty minute pretest waiting period is applicable, is when a test is actually given.

II. IN THE ALTERNATIVE, THERE IS A VALID REASON WHY THE REQUIRED TWENTY MINUTE PRETEST WAITING PERIOD WAS NOT VIDEOTAPED.

In the alternative, if the Court finds that the “required twenty minute pretest waiting period” applies to refusals, and/or that the breath test procedure was not followed, the Court can find that there is an exception to compliance with all factors of the breath test procedure by referring to language the legislature has included in the same code section. S.C. Code Ann. § 56-05-2953. This section also provides its own exceptions that are applicable to the videotaping rule. As the statute reads, “Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording 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 video recording.” S.C. Code Ann. § 56-05-2953(B)(last sentence). A videotaped refusal can also be considered a valid reason for the failure to produce the entire video recording. The Statute is referencing, not creating, a required twenty minute pretest waiting period. This is referring to a testing situation. A *pretest*. The only reference to this requirement is in S.L.E.D. policy requiring a twenty minute waiting period prior to a test. By the plain

reading of this statute there is no statutorily created right to a twenty minute pretest waiting period when a person refuses. A refusal is the antithesis of a test, and upon refusing, any "pretest" is concluded at the time of the assertion. Jansen, at 408 S.E.2d at 235., See, also, SLED Policy 8.12.5(F)(1).

The defense argued State v. Suchenski, 646 S.E.2d 879, 374 S.C. 12 (2007) stands for the proposition that a failure to fulfill the video requirements of the statute is immediate grounds for dismissal. In that opinion, however, the Court rules that an issue was not properly preserved, and that the Court would have considered subsection 2953(B) factors that would mitigate any failure to videotape if that issue had been properly preserved. Furthermore, the facts of that case involve a videotape that ended prior to all field sobriety being performed, while in the instant case, the refusal was videotaped.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court, and remand the case for trial at the circuit court.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHESTER COUNTY
Court of General Sessions
Brooks Goldsmith, Circuit Court Judge

Case No. 2009-GS-12-121

THE STATE
Appellant

v

JUSTIN ELWELL
Respondent

BRIEF OF RESPONDENT

June 30, 2010

MICHAEL L. BROWN, JR.
Post Office Box 1025
223 E. Main Street
Rock Hill, South Carolina 29731

ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

There was a violation of S.C. Code Ann. §56-5-2953 and the remedy is dismissal as the circuit court ruled.

STATEMENT OF CASE

Respondent concurs with the Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Respondent concurs with Appellant's Statement of Facts, but would add that the entire videotape is not twenty minutes.

ARGUMENT

I. THERE WAS A VIOLATION OF S.C. CODE ANN. §56-5-2953 AND THE REMEDY IS DISMISSAL AS THE CIRCUIT COURT RULED.

In the present case, there was a videotape at the breath site, but it is incomplete. It did not record the person's conduct for the twenty minute waiting period. The videotape was not twenty minutes in length. (Tr. p.13) The videotape did not include the time stamp of the machine or the checking of the mouth (Tr. p.10-11).

South Carolina Code Ann. § 56-5-2953 (A) (2) states as follows:

The taping 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 video taped, 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 pretest waiting period must be videotaped.

Section 56-5-2953 (B) list exceptions to the requirements of section 56-5-2953

(A) as follows:

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 device was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment in 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. Further, in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrest, where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal. However, as soon as videotaping is practicable in these circumstances, videotaping must begin and conform with the provisions of this section. 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.

None of the exceptions listed above apply in this matter. There is no sworn affidavit certifying that the videotape equipment or breath test device was in an inoperable

condition. There was no emergency medical treatment required by the respondent. There were no exigent circumstances. The appellant's reliance on the statute allowing the court to consider any other valid reason for failure to produce the video recording based upon the totality of the circumstances is in error. The videotape was produced; it was incomplete. The statute was violated.

“Where a 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.” State v. Gainey, 380 S.C. 23, 667 S.E., 2d 728 (2008). Indeed, “in interpreting statutes, we look to the plain meaning of the statute and the intent of the legislature. First and foremost, a penal statute must be construed strictly against the State and in favor of the Defendant.” Williams v. State, 306 S.C. 89, 410 S.E. 2d 563 (1991). As stated, the statute was violated, which leaves the remedy.

The remedy is provided in City of Rock Hill vs. Cynthia A. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (2007). Suchenski was arrested for driving under the influence and was later charged with DUAC (driving with an unlawful alcohol concentration). At the incident site, the entire arrest was not videotaped as required by S.C. 56-5-2953 because the arresting officer's camera ran out of tape. The videotape included two field sobriety tests and the Miranda warnings, but failed to include the third field sobriety test and the arrest as required. At trial, Suchenski moved to dismiss for failure to provide a complete videotape from the incident site. The Municipal Court denied the motion on the grounds of exigent circumstances; i.e. the fact that the recorder ran out of tape. Suchenski appealed and the circuit court reversed, holding that the motion to dismiss should have been granted. The S.C. Supreme Court held that dismissal was the appropriate remedy

for failure to provide a complete videotape as required by statute. The court stated “Under 56-5-2953, a violation of the statute, with no mention of prejudice, may result dismissal of the charges. The statute provides, ‘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 (exceptions apply)...’ (emphasis added). Conversely, failure to produce videotapes would be ground for dismissal if no exceptions apply.”

The Appellant relies on State v. Jensen, 305 S.C. 320, 408 S.E. 2d 235 (1991) and State v. Parker, 271 S.C. 159, 245 S.E. 2d 904 (1978) for the proposition that in a refusal situation the requirements of §56-5-2953 referenced above (i.e. videotaping of conduct for twenty minutes and of a breath test procedure) are not mandatory. This reliance is misplaced. §56-5-2953 makes no exceptions as to refusal situations (see exceptions above in §56-5-2953 (B)). The statute’s language is plain and unambiguous and must be strictly construed, State v. Gainey, Williams v. State, supra. There was no videotaping requirement at the breath test site at the time of Jensen and Parker. Section 56-5-2953 was passed by the Legislature in 1998. As stated previously, the statute requires a person’s conduct be videotaped for certain amounts of time. Jensen and Parker both involve interpretation of Section 56-5-2950 of the South Carolina code. The trial court’s ruling is pursuant to Section 56-5-2953 which was not even in existence at the time of Parker and Jensen. Also, the trial judge did not address this alleged “exception” and no motion was made pursuant to Rule 59, SCRCP, for a post judgment ruling.

Appellant’s reliance on case law which is supported by SLED policy and SLED policy is also misplaced in this matter. “Policy or guidance issued by an agency other

than in a regulation does not have the force or effect of law” (i.e. statutory authority always controls). Sloan v. S.C. Board of Physical Therapy Examiners, 636 S.E. 2d 598 (S. Ct. 2006). In the 2003 Amendment to South Carolina Code Ann. Section 56-5-2950, the Legislature included in that statute the following:

SLED must administer the provisions of this subsection and must make regulations to carry out its’ provision.

Since 2000, SLED has chosen only to enact five (5) regulations and a variety of “policies” which have no force of law and are merely advisory. One such policy 8.12.5 (labeled Implied Consent Policy Administration of Breath Test) sets forth SLED’s policy and includes the phrase “a subject may be removed from the testing site at any time after a refusal occurs.” This advisory policy is clearly inferior to the statutory mandate of Section 56-5-2953 which requires that the person’s conduct be videotaped during the twenty (20) minute pretest waiting period. Furthermore, this is a policy and not a regulation as required by the statutory amendment above.

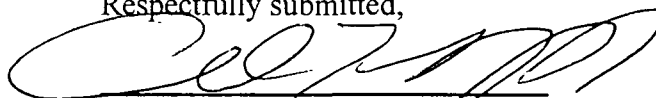
Lastly, the Appellant argues that there is a “failsafe” provision contained in S.C. Ann. §56-5-2953 (B) that this court could use to legitimize the officer’s violation of the videotape requirements. Specifically, the Appellant refers to the following language of S.C. Code §56-5-2953 (B): “Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based on the totality of the circumstances.” The Circuit Court considered the argument and found no valid reasons for the State’s failure to videotape. Appellant offered no affidavit of the officer and no sworn testimony of the officer evincing his reasoning for shutting off the videotape after

the refusal but before the twenty minute pre-test period. This is not a case where the state failed to produce the videotape. This is a case where the breath test operator failed to follow clear statutory language. As such, this statutory provision is inapplicable.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that the ruling of the Circuit Court should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael L. Brown Jr.', written over a horizontal line.

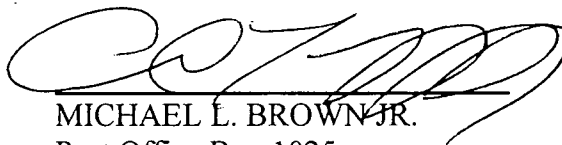
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June 30, 2010

Certificate of Counsel

The final brief of appellant complies with Rule 211 (b), SCACR

A handwritten signature in black ink, appearing to read "Michael L. Brown Jr.", written over a horizontal line.

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June 30, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Brooks Goldsmith, Circuit Court Judge

The State, Appellant.

v.

Justin Elwell Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENTS

- I. **References to S.L.E.D. Policy.** Respondent wrote that reference to SLED policy (8.12.5) or regulations are moot, as Statute controls over these policies. Appellant references these as a way of explaining the Statute as a whole. Statute never refers to a waiting period, until enactment of 56-05-2953, and then only in the context of a “pretest” waiting period. The same Statute, in 56-05-2950(B)(1) gives defendant a right to refuse to take a test, and thereby, stop the testing procedure. There is no understanding of S.C. Code Ann. 56-05-2953(B) in regards to the videotaping of a pretest waiting period, without understanding that the Statute provides a right to refuse. The Statute does not require a video recording of a 20 minute waiting period. It requires a video recording of a 20 minute *pretest* waiting period. It requires the pretest waiting period, by direct reference to the plain language of the Statute, when a test is being given. Therefore, test is complete, and the results are admissible.
- II. **Definition of Breath Test Procedure:** Jansen and Parker have not been changed or overturned by enactment of 56-05-2953. This section requires videotaping of such breath test procedure. 56-05-2953(A)(2)(a) (“the video recording at the breath test site: (a) must include the entire breath test procedure . . . “) It does not define or determine the breath test procedure. It simply requires videotaping of such procedure. The Supreme Court has already determined what breath test procedures are required in both refusal and testing situations. See, Jansen, and Parker.

III. **In the Alternative: Exception for Any Valid Reason for Failure to Produce.**

Respondent argues that the only reason the Court may consider the last paragraph of 56-05-2953 is when there is a failure to produce the *entire* videotape (emphasis added). Respondent, in fact, is arguing that the State has failed to produce a video recording of the 20 minute pretest waiting period. A failure to produce can encompass any area where the statute requires videotaping, such as a 20 minute pretest waiting period. This includes instances where a video has been produced, but lacks the taping of such procedure. Therefore, the Court could use the language in the last paragraph of 56-05-2953, to order that a valid reason, based on the totality of the circumstances, exists. This valid reason being a refusal to take a test.

**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 Miranda² 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

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).

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.

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

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,

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.").

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 [sub]section 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

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-

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

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.

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.

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.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No.: 2009-GS-12-121
SC Court Of Appeals Opinion No.: 4912

The StateAppellant,
v.
Justin Elwell Respondent.

PETITION FOR REHEARING EN BANC

Pursuant to Rule 221, SCACR, the Respondent, Justin Elwell, petitions this Court for a rehearing and reconsideration of the decision filed November 23, 2011 finding that the lower court erred in holding the State failed to comply with S.C. Code Ann. §56-5-2953(A)(2)(d) (Supp. 2008) by turning off the breath test video recorder after Mr. Elwell refused to take the datamaster test before the expiration of the statutorily required twenty minute pre-test waiting period. The basis for this motion, as set forth more fully below, is that the Court has, respectfully, used an ambiguity approach in analyzing an unambiguous statutory provision and has relied, incorrectly, on cases rendered obsolete by the videotaping statute.

Importantly, the Supreme Court in Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E. 2d 806 (2011) recognized that “the purpose of section 56-5-2953. . . is to create direct evidence of a DUI arrest.” In finding that the State can prematurely terminate videotaping, this

Court has taken a clear and unambiguous requirement of a twenty minute waiting period and interpreted it using a “de facto ambiguity theory.” The more reasonable and logical interpretation of legislative intent, if such an analysis is even allowed, is that the choice of the statutory phrasing including use of the word “conduct,” was intended to require more rather than less video evidence of the defendant’s conduct for the dual purposes of memorializing at least twenty minutes of the accused’s conduct and certain enumerated procedural requirements. As discussed below, it is a fair inference that the General Assembly intended to require a twenty minute period to encourage suspects to agree to provide sample evidence.

As this Court stated in its opinion, “[t]he statute must be interpreted with realistic circumstances and rationales in mind” In that context, the General Assembly in the 2008 amendments doubled the sanction for refusal from three months to six months clearly intending to provide an incentive for a person to provide a breath sample and to guarantee a period of time for a person to reflect avoiding premature refusals. Additionally, videotaping twenty minutes of conduct preserves evidence uniquely in the control of the State insuring the accused’s constitutional right to present a defense. In the search for truth and the production of “best evidence” to juries, would not the system want the fact finder to have an opportunity to observe the conduct of the accused for twenty minutes, especially as the fact finder is tasked with the subjective inquiry of whether a person is “materially and appreciably” impaired? Logically, the twenty minute period also creates an extended period for reflection and consideration by the suspect and offers a greater opportunity for suspects to agree to participate in testing. The General Assembly is presumed to know that SLED had failed to enact regulations regarding the termination of videotaping upon refusal even after the enactment of §56-5-2953 and through

today. If the General Assembly thought that termination was appropriate, it would have included such a provision in the law.

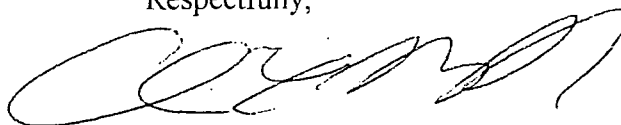
Moreover, this Court's reliance on State v. Parker, 271 S.C. 159, 245 S.E. 2d 904 (1978) and State v. Jansen, 305 S.C. 320, 408 S.E. 2d 235 (1991) cases is wholly misplaced and in the context of the videotaping requirement, those cases are rendered obsolete by the clear and unambiguous language of §56-5-2953. Parker and Jansen were decided well *BEFORE* the statutorily prescribed standards for preservation of video evidence. The court's reliance on these two opinions as still valid is misplaced in light of the General Assembly's enactment of § 56-5-2953 in 1998, which mandated video requirements with no exception for a refusal. The 1978 Parker decision, in a nutshell, adopted the State of Washington's predicates for *prima facie* admissibility of breath testing. It merely mentions a twenty minute waiting period as a predicate for the test and nothing more with no reference or consideration of refusal. In the Jansen opinion, the Court concluded, quite logically, that in the circumstance of a refusal, no foundation is required for a test that did not occur. Mr. Elwell's situation is entirely different from the isolated situations found in Parker and Jansen. Here, unlike Jansen, not only did the Legislature unambiguously require twenty minutes of videotaping, but there is a logical basis for its doing so. As our Supreme Court in Roberts quickly observed, the purpose of the videotaping statute is to gather evidence. What better evidence than twenty minutes of the accused's conduct preserved on video?

Furthermore, contrary to this Court's position that the primary intention behind §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," (emphasis added), the primary intention of §56-5-2953 is found in the first sentence of the statute: "to

video record a person's conduct." The statute does not just protect the State in showing it properly gathered evidence – it also provides the accused with evidence as to his or her conduct and a reasonable time within which to consider the options of submitting or refusing. As this Court notes in footnote six, "The statute protects both the State and the defendant from sometimes unreliable memories of those testifying during trial." The Court's opinion places emphasis on two words of the statute – required and pre-test – while ignoring the intent of the whole statute which is the videotaping of conduct.

For these reasons, Mr. Elwell petitions this Court for rehearing en banc and reconsideration of its opinion urging this Court to recognize, as the Roberts Court did, that the purpose of the statute is to gather evidence, to find that any reliance on Parker and Jansen is misplaced, and to affirm the lower court's dismissal of Mr. Elwell's charge based on the premature termination of the videotape and the resulting loss of evidence. Such a finding will protect Mr. Elwell's constitutional right to present a defense and logically follows from the unambiguous language found in §56-5-2953.

Respectfully,

A handwritten signature in black ink, appearing to read "Michael L. Brown Jr.", written in a cursive style.

Michael L. Brown Jr.

The South Carolina Court of Appeals

The State,

Appellant,

v.



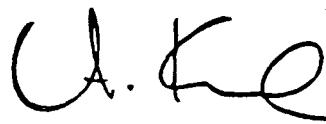
Justin Elwell,

Respondent.

The Honorable Brooks P. Goldsmith
Chester County
Trial Court Case No. 2009-GS-12-00121

ORDER

After a careful consideration of the Petition for Rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded. Hence, there is no basis for granting a rehearing, and it is ordered that the Petition for Rehearing be denied.


_____ C.J.

_____ J.

_____ J.

FILED
16 February 2012