THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2013-CP-46-01390

THE STATE OF SOUTH CAROLINA,

Appellant,

v.

Shelby Jean Lorusso, Respondent.

NOTICE OF APPEAL

The State of South Carolina appeals the Orders of the Honorable John C. Hayes, III dated September 17, 2013 (filed September 20, 2013) and October 7, 2013 (filed October 11, 2013). Appellant received written notice of entry of the latter order on October 15, 2013. These Orders are enclosed herewith as Exhibits A and B, respectively.

November 1, 2013

Aaron J. Hayes, Assistant Solicitor
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Attorney for Appellant

Other Counsel of Record:

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Attorney for Respondent

Exhibit A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO: 2013-CP-46-1390
COUNTY OF YORK	)	
	)	
State of South Carolina,	)	
	)	
Appellant,	)	ORDER DISMISSING APPEAL
	)	
vs.	)	
	)	
Shelby Lorusso,	)	
Respondent.	)	
	)	

Appearance for Appellant: Johanna C. Valenzuela
Appearance for Respondent: Christopher A. Wellborn
Trail Judge: Honorable Clayburn Barnette, Jr., Magistrate

This matter came before this Court pursuant to an appeal taken by the State from a dismissal of the charge against the Respondent, Shelby Lorusso. This dismissal was entered by the trial judge, the Honorable Clayburn Barnette, Jr. on April 24, 2013. The State filed its appeal on May 3, 2013. The appeal was heard by this Court on August 27, 2013. After review of the State's appeal, the Return of Magistrate Barnette, the transcript of record from the proceedings below and argument of counsel I find the following:

FACTS

On December 15, 2012, the Respondent was stopped by Deputy Matthew Palmer of the York County Sheriff's Department. Deputy Palmer ultimately arrested the Respondent and charged her with driving under the influence of alcohol. This case was called for trial on April 23, 2013 before the Magistrate. At the time of the trial, the Respondent moved to have her charge dismissed, asserting that the arresting officer failed to comply with the mandatary video taping requirements of Section 56-5-2953(A)(1)(a)(ii) of the S.C. Code of Laws, as amended. After review of the video

tape of the field sobriety tests and testimony from Deputy Palmer, the Magistrate sustained the Respondent's motion. This appeal followed.

During the hearing for this motion, Deputy Palmer testified that after stopping the Respondent, he directed her to step out of her car and submit to field sobriety tests, including, inter alia, the walk and turn test. Deputy Palmer testified that he asked the Respondent to take nine heel to toe steps in a straight line and that her heels should touch her toes on each step. He further testified that she was to turn back the opposite direction and take nine heel to toe steps on the same line with her heel again touching her toe with each step. Deputy Palmer testified that the Respondent "missed the majority of her steps" when she attempted to walk the first nine steps. He acknowledged the video tape did not show whether her heels actually touched her toes or not. After completing the turn, Deputy Palmer said she "missed the majority of her steps" when she walked back along the line. He also said that this was not visible on the video camera because of the way he had positioned the Respondent relative to the camera. Deputy Palmer stated that he choose which direction to have the Respondent walk and therefore what her position would be relative to the camera.

The Magistrate also reviewed the video tape of the field sobriety tests and found that, as Deputy Palmer testified, whether or not the Respondent's heels touched her toes was not visible on the video tape.

LEGAL ANALYSIS

1. The provisions of S.C. Code Section 56-5-2953(A), as amended in 2009 states in pertinent part that a person charged with driving under the influence must have their conduct video recorded at the incident site as follows:

(A) A person who violated Section 56-5-930, 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 test administered; and

(iii) include the arrest of a person for a violation of Section 56-5-2930 or 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.

HISTORY: 1998 Act. No. 434, Section 9, eff. June 29, 1998; 200 Act. No. 390, Section 23-2003 Act. No. 61, Section 8, eff. August 19, 2003; 2008 Act. No. 201, Section 11, eff. February 10, 2009.

Since the 2009 Amendment to Section 56-5-2953(A), there has been no published, or unpublished, opinion by the South Carolina Supreme Court or Court of Appeals interpreting or applying the requirement that there be a video recording of "any field sobriety test administered." However, the Court of Appeals recently addressed this statute in the context of the mandatory recording requirement for Miranda warnings, see *State v. Henkel*, 746 S.E. 2d, 347 (2013).

In construing the terms of a statute, the primary rule of statutory construction is that a statute should be construed to give effect to the intent of the legislature. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342 713 S.E. 2d 278, 282 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App. 2011). A Court should not attempt to divine the intent of the legislature when the statutory language of the state is clear and unambiguous. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. Spp 2011). Thus, in interpreting a statute, a Court should give words their plain and ordinary meaning, and not resort to forced construction that would limit or expand

the statute in question. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E. 2d 278, 282 (2011). *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 520 (Ct. App. 2011). Lastly, where, as here, the provisions of a statute are penal in nature, the statute must be strictly construed against the State and in favor of the Defendant. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E. 2d 278, 282 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App. 2011).

Arguably, one could say that the statutory language is ambiguous, because the statute does not specifically state or define what is required in the recording of field sobriety test. To the extent there is any ambiguity in the statute, this Court looks to any evidence of the legislature's intent in enacting the statute. Prior to the 2009 Amendment, all that was required by Section 56-5-2953(A)(1), (with respect to the recording of any field sobriety testing), was that the "conduct" of the suspect-driver be recorded at the incident site. Thus, in *Murphy v. State*, 392 S.C. 628, 709 S.E. 2d 685 (2011), under the former provisions of Section 56-5-2953 (A)(1), the video recording at the incident site in that case only showed the suspect-driver doing the "walk and turn test" from the knees or waistline upwards. Although the feet of the suspect-driver could not be seen during the test, which is an important part of the test, the Court of Appeals held that under the *former* statute the video recording requirements of Section 56-5-2953(A)(1)(a) had been complied with:

> While certainly an individual's performance on such tests would be part and parcel of his or her "conduct" at the incident site, as mentioned, an unbroken recording of the tests is not necessary to capture conduct Therefore, the recording need not display all field sobriety tests provided it captures the accused's conduct. 4.

However, footnote number 4 provides as follows:

> As amended in 2009, the current version of Section 56-5-2953 expressly requires the recording of field sobriety tests. See S.C. Code Ann. Section 56-5-2953(A)(1)(a)(ii) (supp. 2010) ("The video recording at the incident site must...include any field sobriety test

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administered."). We note that the legislature's amendment of the plain language of the statute to require the recording of field sobriety tests further bolsters our position that the plain language of the prior versions, in effect at the time of this action, did not require recording of all tests.

The obvious import of the above quote from *Murphy v. State* is that if the complete recording of a person *performance* if any field sobriety test was not required under the former statute, it is now required under the amended statute. The 2009 Amendment specifically provides for the recording of any field sobriety test, which goes beyond the former requirement of merely recording a person's conduct. Had the General Assembly only intended that there be a recording of a person doing a field sobriety test, without there being any way to determine the person's performance on the test, as in *Murphy v. State*, there would have been no need to amend the statute. It must be presumed that the General Assembly did not intent a futile or meaningless act by enacting the 2009 Amendment. *State v. Long*, 363 S.C. 360, 610 S.E. 2d 809 (2005); *State v. Sweat*, 379 S.C. 367, 665 S.E. 2d 645 (Ct. App 2008). To put it plainly, there is no sense in conducting field sobriety tests if the finder of fact can not see the results of such test.

2. That the video recording provisions of S.C. Code Ann. Section 56-5-2953(a) are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). When a proceeding agency fails to comply with the mandatory video recording provisions of S.C. Code Ann. Section 56-5-2953(A), the appropriate remedy is the dismissal of the case against the Defendant. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516 (Ct. App 2001). In *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 SE. 2d 278 (2011), the South Carolina Supreme Court return to the *City of Rock*

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Hill v. Suchenski, decision and reiterated that the un-excused noncompliance with the S.C. Code Ann. Section 56-5-2953 mandates the dismissal of a DUI/DUAC charge:

> As evidenced by this Court's decision is Suchenski, the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provision of Section 56-5-2953. Notably, the Legislature specifically provided for the dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. *Id.* Section 56-5-2953(B) ("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....if (certain exceptions are met).). The term "dismissal" is significant as it explicitly designated a sanction for an agency's failure to adhere to the requirements of Section 56-5-2953.
>
> Furthermore, it is instructive that the Legislature has not mandated videotaping in any other criminal contest. Despite the potential significance of videotaping oral confessions, the Legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provision of Section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance.
>
> Thus, we hold that dismissal is the appropriate sanction in the instant case as this was clearly intended by the Legislature and previously decided by this Court in *Suchenski*.

Likewise, the decisions of the South Carolina Court of Appeals have been consistent with City of Rock Hill v. Suchenski.[1]

3. In the present case the State failed to comply with the videotaping requirements in regard to the "walk and turn test". The Respondent was asked to take several steps by lining up the heel of the front foot against the toe of the trailing foot. The Respondent was then required to turn around and walk in the opposite direction in the same manner. Although the video camera was

[1] *See State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516 (Ct. App. 2011) (officer violated Section 56-5-2953(A)(2),, when he failed to capture the administration of the breath test to the Defendant on videotape, when the first breath test machine was not working, and the officer moved the Defendant to another machine in the same room but failed to activate the videotape for that second machine in the same room but failed to activate the videotape for that second machine; although the officer could be seen on the video made from the first machine which was left on the entire time, and the Defendant could be heard, the Defendant himself could not be seen; case should have been dismissed); *Murphy v. State*, 392 S.C. 626, 709 S.E. 2d 685 (2011) (the remedy for noncompliance with Section 56-5-2953 is dismissal of the case, not mere suppression of the evidence).

recording during the Respondent's performance of this test, it was positioned in such a manner that the Respondent's heels were not visible as they touched or did not touch her toes. Therefore, the Respondent's performance, an important part of the test, was not video taped.

The State has argued that compliance with the statute should be excused in this case because the actions of the arresting officer in failing to record the field sobriety test was not intentional or in bad faith. Whether an officer acts in good faith, or if any omission in recordings is unintentional, does not excuse noncompliance under S.C. Code Ann. Section 56-5-2953. The General Assembly has provided for exceptions for noncompliance under Section 56-5-2953(B), but none have been invoked by the State in this case. See, *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007) (charge of DUAC was dismissed where arresting officer was unaware that his recording tape had run out, and failure to record as neither intentional or done in bad faith).

In the present case the arresting officer did not properly video tape the Respondent being given the walk and turn field sobriety as required by Section 56-5-2953(A)(1)(a)(ii). The recording requirements of Section 56-5-2953 are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011), *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007). The only remedy for noncompliance with the video recording requirements of Section 56-5-2953 is dismissal of a case. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011), *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007). Admittedly, the sanction of dismissal is severe, but as the South Carolina Supreme Court observed in *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011), the Legislature has clearly intended strict compliance with the provision of Section 56-5-2953 and, in turn, promulgated a severe sanction of dismissal for noncompliance.

IT IS THEREFORE ORDERED, that based upon above stated findings of fact and conclusions of law, the Court hereby dismisses the appeal of the State in South Carolina v. Shelby Lorusso, 2013-GS-46-1390.

AND IT IS SO ORDERED.

John C. Hayes, III
Chief Administrative Judge #8
Sixteenth Judicial Circuit

York, South Carolina
September 17, 2013

Exhibit B

STATE OF SOUTH CAROLINA COUNTY OF YORK State of South Carolina, Appellant, vs. Shelby Jean Lorusso, Respondent.	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT C.A. No.: 2013-CP-46-1390 ORDER

The Court issued an Order in this Appeal from Magistrate's Court on September 17, 2013. The State has timely filed a Rule 59(e) SCRCP Motion to Reconsider.

The gist of the State's motion to reconsider is that the Court did not specifically address all of its grounds for reversal of the ruling of the Magistrate Judge.

The Court has reviewed the September 17, 2013 Order and the grounds the State asserts need to be specifically addressed. The Court finds its analysis of the issue on appeal was thorough and viewed through the lens of the applicable law, § 56-5-2953, South Carolina Code of Laws, 1976, as amended.

The Code did not have to analyze any issue relative to an Order of Judge Lee S. Alford in The State v. John Douglas Pittman.

Here, a video was produced and the Magistrate had it to review. This is not a § 56-5-2953(B) totality of the circumstances issue. Here, the issue was the content, not the absence, of a video tape and its compliance with § 56-5-2953(A)(1).

There is no authority cited regarding the State's fifth ground for reconsideration. The issue on appeal is from a ruling of law, not of a finding of fact.

The State argues that the Magistrate's ruling and thus the Court's upholding of same creates an "absurd" result and that compliance with the statutory scheme is "impossible" and not physically possible." These latter assertions are just wrong.

The State's Motion to Alter/Amend is DENIED.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

October 7th, 2013
York, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2013-CP-46-01390

THE STATE OF SOUTH CAROLINA,

Appellant,

v.

Shelby Jean Lorusso, Respondent.

PROOF OF SERVICE

I hereby certify that I have served a copy of the foregoing Notice of Appeal in the above-referenced matter upon Christopher A. Wellborn, Esquire, as counsel of record for Respondent, by hand-delivering a copy of same to his office at 142 Oakland Avenue, Suite C, Rock Hill, South Carolina 29730, in accordance with the provisions of Rule 262(b) of the South Carolina Appellate Court Rules.

Served this day,
November 1, 2013

Aaron J. Hayes, Assistant Solicitor
16th Judicial Circuit Solicitor's Office
1070 Heckle Boulevard, Suite 207
Rock Hill, South Carolina 29732
Attorney for Appellant

KEVIN S. BRACKETT
SOLICITOR

November 1, 2013

VIA FIRST CLASS MAIL

Hon. Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box. 11629
Columbia, South Carolina 29211

Hon. David Hamilton, Clerk of Court
York County Court of Common Pleas
P.O. Box 649
York, South Carolina 29745

Re: *State v. Shelby Jean Lorusso*, Case No. 2013-CP-46-01390

Dear Ms. Kitchings and Mr. Hamilton:

Please find enclosed an original and one copy of the Notice of Appeal and Proof of Service in the above-referenced matter. Please file the original and return a clocked copy to me in the enclosed self-addressed stamped envelope, in accordance with your normal procedures.

Since this Appeal is being pursued by the State of South Carolina, I am informed that no filing fee is necessary. As always, please do not hesitate to contact me at (803) 909-7582, should you have any questions or concerns.

Sincerely,

Aaron J. Hayes
Assistant Solicitor

enclosures as stated

cc: Christopher A. Wellborn, Esquire *(via hand-delivery)*
Salley W. Elliot, Senior Assistant Deputy Attorney General *(via email)*

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