IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of Common Pleas
Lee S. Alford, Circuit Court Judge

Case No. 2012-213281

City of Fort Mill,

Appellant,

v.

Colin Duane Fitzgerald,

Respondent.

INITIAL BRIEF OF RESPONDENT

J. Tyler Burns
SC Bar No. 77512

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ATTORNEY FOR RESPONDENT

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II. The circuit court was correct in finding that the City failed to produce a video conforming to section 56-5-2953 of the South Carolina code of Laws; and correctly reversed Respondent's conviction for DUAC because the arresting officer failed to provide a sworn affidavit to justify his failure in complying with the videotaping statute.

III. The circuit court did not err in failing to consider the totality of the circumstances because the statute does not require either the circuit court or the trial court to conduct a balancing test of the totality of the circumstances.

STATEMENT OF THE CASE

The facts of this case are slightly odd and procedurally confusing. Respondent was stopped inside the city of Fort Mill by Sgt. Andy Boone of the York County Sheriff's Office for suspicion of driving under the influence on October 9, 2011. Sgt. Boone initiated a traffic stop on the Respondent in the city of Fort Mill. However, because Sgt. Boone was already in the process of transporting another detainee, from an arrest not associated with this current case, Sgt. Boone called for Fort Mill Police Department to take over the investigation. Shortly thereafter, Officer Baird of the Fort Mill Police Department arrived on scene to investigate. At the point Officer Baird arrived on scene, Sgt. Boone returned to his patrol car.

The City elected to proceed to trial on the charge of driving with an unlawful alcohol concentration (DUAC), rather than the initial of charge of DUI. Prior to and also during trial, Counsel for the Respondent made several motions to dismiss the charges based on the fact that Officer Baird supplied no video of the incident site or a sworn affidavit justifying his failure to comply with section 56-5-2953 of the South Carolina Code of Laws (Supp. 2011). At trial the only video offered by the City was from Sgt. Boone's patrol car. Because Sgt. Boone returned to his patrol car after Officer Baird arrived on scene, the video from Sgt. Boone contained only video images and no audio of Respondent or Officer Baird. All pretrial motions made by Respondent's Counsel were denied and Respondent was convicted of DUAC. After the return of the guilty verdict, the Municipal Court Judge released the jury. As a result the Jury made no finding of fact as too the Respondent's breath alcohol concentration (BAC). Rather than sentencing Respondent at the base level for the offense, the Municipal Court Judge, upon his own motion, granted a mistrial.

Respondent timely filed his Notice of Appeal of Respondent's conviction. The Honorable

John C. Hayes, III, heard the matter and found that the appeal was not ripe as Respondent had not been sentenced. Judge Hayes also ordered that the mistrial be set aside and the case be remanded for sentencing. Appellant never challenged the ruling of Judge Hayes. Instead notice of a sentencing hearing was sent to both Counsel for the City and Respondent. After the entry of the sentence, Respondent again timely filed his Notice of Intent to Appeal to the Circuit Court. Again, Appellant never challenged or appealed the previous order of Judge Hayes. The matter came before the Honorable Judge Lee S. Alford on September 7, 2012. On September 28, 2012, Judge Alford entered an order reversing Respondent's conviction that Appellant now appeals.

ARGUMENT

I. Appellant's motion to remand this case to the municipal court has already twice been made and ruled upon by this Court and the Supreme Court. The circuit court did not lack jurisdiction to hear this matter and any potential error on the part of the circuit court is procedural and not jurisdictional. Finally, to remand this case would be a waste of judicial resources as only questions of law, not facts, are presented for review.

Appellant's contention that this case should be remanded for a new trial because the circuit court lacked jurisdiction to hear the matter is entirely without merit. Appellant has raised this argument previous to its initial brief on April 26, 2013, in a motion to this Court to entitled Motion to Vacate Circuit Court Rulings; Remand for a New Trial; and Dismiss Appeal Without Prejudice. Respondent replied to this Motion and Appellant's Motion was denied by this Court. Appellant then filed to the South Carolina Supreme Court on July 26, 2013 in a motion entitled Motion to Certify Case to Supreme Court; Vacate Circuit Court Rulings; Remand for a New Trial; or Accept Jurisdiction and Grant Extraordinary Relief. Appellant's Motion to certify this question was initially granted by the Supreme Court. Respondent then filed a Motion to reconsider in which the Supreme Court reversed its previous order and subsequently declined to certify. This case was then remanded to the Court of Appeals. Appellant has raised this issue twice before. Respondent has responded to this issue twice before and twice before both this Court and the Supreme Court has denied Appellant's contentions that the circuit court lacked the jurisdiction to hear this case.

Appellant's argument that the circuit court was without jurisdiction to hear the appeal is incorrect. Section 14-25-90 of the South Carolina Code of Laws (1976 as Amended) states that "Any party shall have the right to appeal from the sentence or judgment of the municipal court to the Court of Common Pleas of the county in which the trial is held." The Court of Common

Pleas for York County had the jurisdiction to hear the appeal. However, Appellant confuses the jurisdiction of the court with the procedural error concerning the ripeness of the appeal. The Respondent was convicted of a jury for the offense of DUAC and Respondent appealed that judgment to the Court of Common Pleas. Whether or not Respondent filed the appeal at the correct time is a question of procedure, not of jurisdiction. As Judge Hayes states in his order, the first appeal from Respondent was not ripe and the case was remanded for sentencing. But simply filling the appeal prematurely did not rob the circuit court of its jurisdiction.

Appellant has also waived this argument by failing to preserve it for the review of this Court. As Appellant mentions in its initial brief, "Respondent failed to raise any issue related to the mistrial being granted by the Municipal Court."(Initial Brief of Appellant pg. 5). On this Appellant is correct and just as Respondent never asked the municipal court to declare a mistrial, Respondent never raised this issue to the circuit court on appeal. Just as the Municipal court decided on its on motion to declare a mistrial, the circuit court decided on its on motion to set the mistrial aside. Appellant cites State v. Smith, 383 S.C. 159, 679 S.E.2d 176 (2009), stating "the South Carolina Supreme Court vacated an opinion of the Court of Appeals because the Court found the State did not have a right to appeal the underlying order of the lower court." However, Respondent never appealed the mistrial to the circuit court. The only issues that were appealed by Respondent were the issues of law concerning the videotaping statute that should have resulted in dismissal of the Respondent's charges at the municipal court. If Appellant felt that Judge Hayes erred in his decision to set aside the mistrial, Appellant should have appealed that decision. However, Appellant never raised the issues of Judge Hayes' order. Instead, Appellant abided by Judge Hayes' order and the case was remanded for sentencing. After sentencing the case was then re-appealed and argued before Judge Alford. It is the Order of Judge Alford that

Appellant now appeals, not the order of Judge Hayes. Because Appellant never appealed the ruling of Judge Hayes, Appellant has not preserved this issue for review and it should not be considered by this Court now.

To remand this case for a new trial would only serve as a colossal waste of judicial resources and economy as nothing would be resolved from a new trial. Everything at issue in this case and this appeal are matters of law, not matters of fact that could be decided by a new jury. If this case were to be remanded, then a new jury would hear the same evidence and facts. But regardless of their decision of the facts, all involved with this present appeal would be left to start over in settling the issues of law. The facts before the previous jury that convicted the Respondent are the same exact facts that would be presented to a new jury. The issue in this current appeal is whether or not Respondent's conviction was properly reversed by the circuit court because the City's failure to provide a recording that complied with section 56-5-2953 or a sworn affidavit excusing that failure. As the record reflects, the City made a willful decision to not keep the video recording equipment inside their patrol cars in operable condition because of a financial dispute the City had with the Department of Public Safety over who was to pay for the upkeep to this equipment. At trial the City provided no video of the incident site. The City provided no sworn affidavit excusing the failure to provide a video, and in fact, admitted that they could not submit such an affidavit because the City made the conscious decision not to take reasonable efforts have been made to maintain the equipment in an operable condition. As the Supreme Court held in Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 344, 713 S.E.2d 278, 284 (2011), "prolonged failure to equip its patrol vehicles with video cameras defeats the intent of the Legislature; therefore, the Town should not be able to avoid its statutorily-created obligation to produce a videotape by repeatedly relying on subsection (G) of section 56-5-2953." These facts

exist the exact same now as they did previously at pretrial, trial and the circuit court appeal. There is no reason that these facts, as they exist on the record and as the law of the case, should change in the future. The City could not provide a video of the incident site at trial. The City could not present an affidavit at trial excusing noncompliance with the section 56-5-2953 because of the ruling of Roberts. Because the facts have been and will always be these same set of facts, to remand this case for a new trial would only serve to delay this the resolution of this matter and bring all the parties back to this same position at a later time.

There is no valid purpose that can be served by remanding this case to the municipal court for a new trial. Such a remand would only serve to waste the resources of this and all lower courts involved. A remand would resolve none of the issues brought before this Court now and would only cause a delay in the resolution of Respondent's case.

II. The circuit court was correct in finding that the City failed to produce a video conforming to section 56-5-2953 of the South Carolina code of Laws; and correctly reversed Respondent's conviction for DUAC because the arresting officer failed to provide a sworn affidavit to justify his failure in complying with the videotaping statute.

The circuit court correctly ruled that that the arresting officer failed to provide a video complying with the statutory requirements of section 56-5-2953 or a sworn affidavit to excuse this noncompliance. Because the arresting officer failed to comply with the statutory provisions of 56-5-2953, the circuit court was correct in reversing the Respondent's conviction for DUAC.

Factual Background

As stated above, the initial traffic stop of the Respondent was initiated by Sgt. Andy Boone of the York County Sheriff's Office. Due to Sgt. Boone already having another individual, from a previously unrelated incident, detained in his patrol car, Sgt. Boone requested that Fort Mill Police Department take over the DUI investigation. Officer Baird from the Fort Mill Police arrived on scene and took over this investigation. At this time, Sgt. Boone returned to his patrol car.

At trial, the City offered the video from Officer Boone's patrol car. Because Sgt. Boone returned to his car immediately after Officer Baird arrived, the video from Sgt. Boone contained no audio of Respondent or Officer Baird. At no point did the City ever produce a video from Officer Baird's patrol car or a sworn affidavit justifying Officer Baird's failure to comply with the statute. At the hearing before Judge Alford, Counsel for the City conceded "there is no audio on the tape and we have to concede there is no sworn affidavit." (9/12/2012 T. page 15, lines 7-9). In fact, Appellant even went so far as to admit that Officer Baird could not produce a video or an affidavit because Fort Mill Police Department willfully refused to keep their video equipment

in operable conductions because they could not get the money from the Department of Public Safety. (9/12/2012 T. pages 22 line 2 through page 24 line 14.) Appellant is incorrect in that Respondent never contested the fact that Officer Baird claimed to have read Respondent his Miranda rights. One of the pretrial motions made for dismissal of the case was based on the fact that the video does not show Respondent being advised of his Miranda warnings. The video from Sgt. Boone's car does show the Respondent being placed in handcuffs. At this point, Officer Baird moved behind Respondent and positioned himself between Sgt. Boone's patrol car and the respondent so that Respondent's body was partially obstructing Officer Baird from the camera's view. Officer Baird appears to reach into his pocket and appears to remove something from that pocket. But due to the fact that Officer Baird moved behind the Respondent, it is not clear what he may have taken out of his pocket.

Law

The circuit court correctly reversed Respondent's conviction because the arresting officer in this case, Officer Baird, failed to comply with the statutory requirements of Section 56-5-2953. Section 56-5-2953(B) states "Failure by the *arresting officer* to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 *if the arresting officer submits a sworn affidavit*." (emphasis added). Additionally, this present case is very similar to the facts of State v. Landis, 362 S.C. 97, 606 S.E.2d 503, 505 (Ct. App. 2004). Landis was pulled over by a State Transport Officer for suspicion of DUI. Shortly after the transport officer initiated the traffic stop State Trooper Davis arrived on scene. The Trooper Davis conducted the field sobriety tests, determined that Landis was impaired and, as this Court emphasized, placed him under arrest for DUI. This Court also stated in Landis that "Therefore, we hold that the State Transport Officer

merely assisted in facilitating the traffic stop. Trooper Davis was the arresting officer responsible for meeting the statutory videotaping requirements of section 56-5-2953(A)." The facts of Landis are almost identical to the facts of this current appeal. Sgt. Boone merely assisted in facilitating the traffic stop. It was Officer Baird who conducted the field sobriety tests, made the determination that the Respondent was under the influence, and placed Respondent under arrest. Therefore, Officer Baird is the arresting officer that must have met the statutory requirements of section 56-5-2953. The only video provided in this case comes from Sgt. Boone, who is not the arresting officer. Because Officer Baird was the arresting officer, it is Officer Baird who is required to either produce a video that meets that statutory requirements of the section, or produce a sworn affidavit. In this case, Officer Baird did not produce a video or submit a sworn affidavit. In fact, no affidavit was ever submitted from Officer Baird or Sgt. Boone excusing the lack of audio on the video from Sgt. Boone's patrol car.

Because Officer Baird is arresting officer for the purposes of section 56-5-2953, it was Officer Baird that is required to meet the statutory requirments of the statute. Because Officer Baird did not submit a video or an affidavit, as is required to be in compliance with the statute as the arresting officer, the circuit court correctly reversed Respondent's conviction. This is a clear violation of the videotaping statute and as such under City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007), the only remedy is dismissal of Respondent's charge.

Respondent agrees that the "Cardinal rule of statutory construction is to ascertain and give effect to the intent of legislature." State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). Also that "the Legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning." State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003). And when this "well-settled rule of

statutory construction, that a court is bound if possible, to give some place and effect to every word found in a statute," it is clear that the circuit court correctly reversed Respondent's conviction. Burns v. Gower, 34 S.C. 160, 13 S.E. 331, 332 (1981). When every word, clause and sentence in section 56-5-2953 is examined, it is clear that the City failed to comply with the law and the only remedy under City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007), is dismissal of Respondent's charge.

In this case the City failed to provide a video that complied with the statute. Section 56-5-2953 reads:

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

The statute starts out that a person much have his conduct at the incident site recorded. As stated in State v. Murphy, 392 S.C. 626, 631, 709 S.E.2d 685, 688 (Ct. App. 2011), "Conduct is generally defined as one's behavior, action or demeanor." According to Merriam-Webster's dictionary, conduct is defined as 1. the way that a person behaves in a particular place or situation; 2. the way that something is managed or directed. http://www.merriam-webster.com/. Likewise, behavior is defined as the 1 : the manner of conducting oneself. Similarly demeanor is defined as 1: a person's appearance and behavior, 2: the way someone seems to be to other

people. *Id.* What all of these have in common, when looking at the plain meaning of each word in their plain and ordinary meaning is that the legislature clearly intended for a person's physical as well as verbal conduct to be included on the video of the incident site. In looking at a person's behavior, the manner of conducting oneself. It is not enough that you can physically see the person, but in order to truly observe their behavior, you have to see and hear them. To include one without the other would be to only observe half of one person's conduct because a person's verbal statements or responses to questions would be part of their conduct.

Section 56-5-2953(A)(ii) also states that the video recording must: "(ii) include any field sobriety tests administered." standardized field sobriety tests include two parts. The first is the physical action that the person must perform. But in two of the field sobriety tests there is also a verbal factor that must also be included. The Officer must first explain the instructions of each test. For the walk and turn the officer instructs the person that they are to imagine a straight line and take nine heel to toe steps down that line... and that they are to Count each step aloud.On the one leg stand test the Officer instructs the person that they must raise one foot of their choosing six inches off the ground; to hold their foot parallel to the ground and, while doing that, Count aloud. These verbal instructions as well as the verbal responses required from the person are part of the field sobriety tests. To have only the visual and not the audio would be to not include the entire field sobriety test.

The statute also requires that video must show the person being advised of his Miranda rights. To show a person being advised of their Miranda rights requires that it must be both audio and video of the person being informed of their Miranda rights. The statute does not say, as Appellant contends, that the video must show the officer pulling something out of his pocket and the video must appear as though the Officer is reading something to the person, and these two

actions are sufficient to meet the requirments of law as long as the Officer later testifies that what he took out of his pocket was his Miranda card and what he appeared to read were Miranda rights. The only reason the Legislature could have intended this requirement that the video show a person being advised of their Miranda rights is to require that the video have visual as well as audio of those rights being administered.

In looking at every reasonable construction of section 56-5-2953, the only reasonable conclusion is that the Legislature intended that the person's conduct, field sobriety tests, and the administration of Miranda rights be heard as well as visually seen. Assuming for the pure sake of argument that the Legislature never intended for audio communication to be considered conduct, part of the field sobriety tests or part of Miranda, the circuit court correctly reversed Respondent's conviction because the only video supplied was not the video of the arresting Officer. This is not a case where the video from the arresting officer fails to contain audio of the events at the incident site. Instead, the arresting officer provided no video at all of the incident site. On both accounts, the circuit court correctly reversed Respondent's conviction for DUAC because section 56-5-2953 was not complied with by any law enforcement officer.

III. The circuit court did not err in failing to consider the totality of the circumstances because the statute does not require either the circuit court or the trial court to conduct a balancing test of the totality of the circumstances.

Nothing in the statute requires a court to conduct a balancing test to determine if a case should be dismissed or not based on the totality of the circumstances. 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."(emphasis added). The statue allows a Court to consider the totality of the circumstances but does not mandate that the Court examine all circumstances of the case. Although not required, when examining the facts contained in this record that: Officer Baird did not produce a video of the incident site; that Officer Baird submitted no sworn affidavit; and that Officer Baird willingly refused to keep his videotaping equipment in working condition; it is hard to argue that Judge Alford abused his discretion in considering the totality of the circumstances. Also as the Supreme Court as held "as evidenced by this Court's decision in Suchenski, the Legislature clearly intended for a per se dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953." Roberts at 348. Also, "our appellate courts have strictly construed section 56-5-2953 and found that a law enforcement agency's failure to comply with these provisions is fatal to the prosecution of a DUI case." *Id.* At 346. Because our courts take a position of strict construction, there is no error on the part of Judge Alford to consider the totality of the circumstances in light of such a clear violation of the statute.

Respondent also asserts that Appellant has failed to preserve this issue for this Courts review. At no time in the past has Appellant ever raised the issue that Judge Alford erred in considering the totality of the circumstances. The notice of appeal from the City of Fort Mill states that Appellant appeals the Order of Judge Alford dated September 28, 2012. Of the three

issues on appeal, none of them mentions the words totality of the circumstances. For that reason Appellant has failed to preserve this issue for the Courts appellate review and ask that it not be considered now.

CONCLUSION

For the submitted reasons, it is asked that the order of the circuit court reversing Respondent's conviction for Driving with an Unlawful Alcohol Concentration and dismissing the case against the Respondent, because the City failed to comply with section 56-5-2953, be affirmed.

Respectfully submitted,

J. Tyler Burns
SC Bar No. 77512

By: _____

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ATTORNEY FOR RESPONDENT

January 20, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable Lee S. Alford, Circuit Court Judge
Appellate Case Tracking No. 2012-213281

City of Fort Mill, Appellant,

vs.

Colin Duane Fitzgerald, Respondent.

PROOF OF SERVICE

I, Jamie White, certify that I have served the Initial Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

William M. Blitch, Jr.
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 20nd day of January, 2014.

Jamie White
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STATE OF SOUTH CAROLINA

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PLEASE REPLY TO: Fort Mill

January 20, 2014

Hon. Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC, 29201

RE: City of Fort Mill v. Colin Fitzgerald
Appellate Case Tracking No. 2012-213281

Ms. Kitchings:

Please find enclosed the orgingal as well as 6 copies of Respondent's Initial Brief as well as cerfiticate of service.

Sincerely,

J. Tyler Burns

Enclosures

cc. Mr. William M. Blitch Jr.

RECEIVED
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