

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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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.

---

**RECORD ON APPEAL**

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**SC Court of Appeals**

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\*Videotape to be Transported Separately to the Court

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS  
FOR THE SIXTEENTH JUDICIAL CIRCUIT

COUNTY OF YORK )

City of Fort Mill, )

Respondent, )

C. A. No. 2012-CP-46-02640

vs. )

Colin Duane Fitzgerald, )

Appellant. )

ORDER

FILED-RECEIVED  
2012 SEP 28 PM 2:29  
DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

This matter is before the Court on Appeal from the City of Fort Mill Municipal Court. Colin Duane Fitzgerald, Defendant (Appellant), was represented by J. Tyler Burns of the law firm of Reeves, Aiken and Hightower, LLP. The City of Fort Mill was represented by Jenny Desch of the Sixteenth Circuit Solicitor's Office.

Factually and procedurally, this is an unusual case. Fitzgerald was stopped in the City of Fort Mill by a York County Sheriff's Deputy. The deputy was transporting someone in his vehicle at the time, and he called in a Fort Mill policeman to investigate the matter. The police vehicle driven by the city officer did not have a working video recorder. The county deputy remained on scene with his video recorder on. However, the microphone was attached to his person, and when he got into his vehicle, there was no audio recording of the field sobriety test or Miranda warnings being given by the arresting officer.

*[Handwritten initials]*

Fitzgerald was charged with DUI and went to trial on a DUAC charge. Defense counsel made pretrial motions for dismissal on the grounds that the State failed to comply with the requirements of Section 56-5-2953. The motions were denied.

The case was tried before a judge and jury on April 24, 2012. The jury found Fitzgerald guilty of DUAC. The jury was dismissed. Before sentencing, it was brought to the attention of the trial judge that the required verdict form in which the jury was required to make a finding as to alcohol content was not submitted to the jury and no finding was made by the jury. The trial judge realized the oversight and ordered a mistrial, sua sponte, and placed the case back on the jury trial docket.

Fitzgerald appealed to the Circuit Court on June 27, 2012. Judge John C. Hayes, III, ordered the mistrial to be set aside as improvidently granted and remanded back to the trial court for sentencing according to the jury verdict. Fitzgerald was subsequently sentenced by the trial judge.

Issues on Appeal

1. The Court erred in not dismissing the case for failure by the arresting officer to comply with S. C. Code Ann. § 56-5-2953 (B) to provide a sworn affidavit to explain why no video of the incident site could be provided.
2. The Court erred in not dismissing the case for failure of the non-arresting officer to comply with S. C. Code Ann. § 56-5-2953 (B) to provide a sworn affidavit to explain why no audio was included in his video of the incident site.
3. The Court erred in not dismissing the case for violation of S. C. Code Ann. § 56-5-2953 in that the video at the incident site does not show the Appellant being advised of his Miranda warnings.

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Section 56-5-2953 provides in pertinent part as follows:

(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**:
  - (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 shows the person being advised of his Miranda rights. [Emphasis added]

(B) Nothing in this section may be construed as prohibiting the introduction of other relevant 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 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 submitted a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition \_\_\_ or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances, including but not limited to, road blocks, traffic accident investigations, and citizens arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording 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 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.

Section 56-5-2953 was amended in 2008 and rewrote subsection (A) and substituted "video recording" for "videotape," "videotapes" and "videotaping," throughout.

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### Discussion

The visual part of the video recording of the administration of the field sobriety tests is included in the video recording at the incident site. However, the audio part of the video recording of the field sobriety tests, Miranda warnings, and verbal communication by Fitzgerald is not included. Therefore, the wording of any Miranda warnings, instructions by the officer administering the field sobriety tests, and verbal responses by Fitzgerald are not included.

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. The determination of legislative intent is a matter of law. State v. Landis, 362 S.C. 97; 606 S.E. 2d 503 (Ct. App. 2004).

The 2008 amendment to Section 56-5-2953 by the legislature must have been made for a reason and purpose. The only logical and rational basis for the amendment is a legislative intent to require the video at the incident site and the breath test site to include audio of those procedures in the videos.

The arresting officer did not provide an affidavit to the trial court which provides information creating an exception to the video recording required by Section 56-5-2953 (B). Failure to install operative video recording equipment does not meet the requirements of that section. See Town of Mt. Pleasant v. Roberts, 393 S.C. 332 (S.C. 2011). In fact, no sworn affidavit by the arresting officer was offered to the Court.

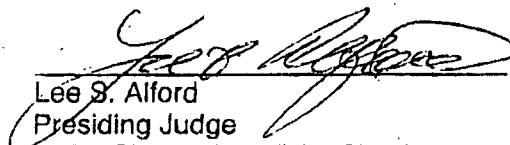
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The remedy for failure to provide a video recording or an affidavit of the arresting officer which meets the requirements of Section 56-5-2953 is a dismissal of the charge. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (S.C. 2007).

Conclusion

The State has failed to provide a video recording or an affidavit of the arresting officer creating an exception, as set forth in Section 56-5-2953. The conviction in the Fort Mill City Municipal Court of Colin Duane Fitzgerald on a charge of DUAC is reversed and the charge is dismissed.

IT IS SO ORDERED.

  
Lee S. Alford  
Presiding Judge  
of the Sixteenth Judicial Circuit

York, South Carolina

September 27, 2012

*Handwritten initials*

STATE OF SOUTH CAROLINA  
COUNTY OF YORK  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2012CP4601625

FILED-RECEIVED

2012 JUN 28 PM 12:26

Fort Mill City of

Colin Duane Fitzgerald

DAVID HAMILTON  
C.C.P. & GS  
YORK COUNTY, SC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for:  Plaintiff  Defendant  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ~~DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.~~
- ACTION DISMISSED (CHECK REASON):
  - Rule 43(k), SCRPC (Settled);
  - Rule 12(b), SCRPC;
  - Rule 41(a), SCRPC (Vol. Nonsuit);
  - Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Rule 40(j) SCRPC;
  - Bankruptcy;
  - Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
  - Affirmed;
  - Reversed;
  - Remanded;
  - Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IS ORDERED AND ADJUDGED:

- See attached order, (formal order to follow)
- Statement of Judgment by the Court

*Mistrial set aside as improvident, granted  
Remanded for sentencing according to the verdict of the trial jury*

ORDER INFORMATION

Order  ends  does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge  
CPFORM4M

*John C. H. [Signature]*

2049  
Judge Code

6/27/12  
Date

For Clerk of Court Office Use Only

7

This judgment was entered on 6-28-12, and a copy mailed first class or placed in the appropriate attorney's box on 6-28-12, to attorneys of record to parties (when appearing pro se) as follows:

Jenny E. Desch  
York County Solicitor's Office  
1675-1A York Hwy  
York, SC 29745

Tyler Burns  
1012 Market St  
Fort Mill, SC 29716

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Reporter: Karen Ambroziak

1 STATE OF SOUTH CAROLINA

2 -----x

3 COLIN DUANE FITZGERALD,

4 Appellant,

5 Case No.

6 -against- 2012-CP-46-2640

7

8 THE CITY OF FORT MILL,

9 Respondent.

10 -----x

11 September 7, 2012

12 York County, S.C.

13

14 B E F O R E:

15 HONORABLE LEE S. ALFORD,

16

17 A P P E A R A N C E S:

18 J. TYLER BURNS, Esquire

19 Attorney for the Appellant

20

21 JENNIFER DESCH, Esquire

22 Attorney for the Respondent

23

24 Aileen Butler

25 Official Court Reporter

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THE COURT: This is the case of Colin Duane Fitzgerald versus City of Fort Mill.

MS. DESCH: Good morning, Your Honor.

THE COURT: Good morning.

MR. BURNS: May I?

THE COURT: Yes, sir.

MR. BURNS: This is a really procedurally weird case. The more we tried to correct it the worse it got. I filed a brief on the original appeal that was under a different number that Judge Hayes heard and remanded and then I re-filed.

I have essentially the same brief that I sent to counsel for the city before, but I don't know if it made it to this file.

THE COURT: No, sir.

MR. BURNS: If I could, I would like to hand that up.

THE COURT: Yes, sir. Do you have a copy for her?

MR. BURNS: Yes. It is essentially the same thing.

MS. DESCH: By essentially what do you mean?

MR. BURNS: I changed the date and the

1 number.

2 THE COURT: Why was it remanded?

3 MR. BURNS: It was a DUAC in which the jury  
4 never made a determination as to the defendant's  
5 blood alcohol concentration. The jury was  
6 excused without any sentence being imposed and  
7 the city judge declared a mistrial.

8 I appealed that. It came before Judge  
9 Hayes. He essentially said you can't mistry it  
10 once they have been convicted and remanded it for  
11 sentencing and then basically said I could start  
12 over after sentence was imposed.

13 It was remanded. He was sentenced on it and  
14 then I re-filed the appeal based on the same  
15 grounds as before.

16 MS. DESCH: Your Honor, if I may clarify  
17 just a few things because this is the one of the  
18 points the city would like to say for the record  
19 to preserve the record.

20 It is true we got to the point where the  
21 jury came back with a guilty verdict and then  
22 Judge Lindsey dismissed the jury. It was at that  
23 point that the defense brought to the Court's  
24 attention that he had failed to mark on the  
25 verdict form that they had to choice what number.

1           There was some brief discussion about how to  
2           deal with it at that point and the the parties  
3           obviously could not agree and Judge Lindsey got  
4           frustrated and he declared a mistrial.

5           At that point the defense counsel appealed  
6           on the issue that is before you today. Appealed  
7           on the fact that he -- that the City did not  
8           submit a sworn affidavit to deal with some  
9           inconsistent -- or some missing audio on the  
10          video. That came up. I pointed out the fact  
11          that you can't appeal. It is not ripe when no  
12          sentence has been entered under criminal rules of  
13          procedure 10-A.

14          We brought that up again in front of Judge  
15          Hayes. He agreed and sent it back down for the  
16          purpose of sentencing.

17          The judge through his law clerk, Nancy, at  
18          Fort Mill PD asked us to appear. The defense  
19          asked that we go in front of Judge Wood this  
20          time and so we did and when Judge Wood's saw  
21          essentially the mess that was before him he said  
22          I don't feel comfortable dealing with this.

23          At that point the defendant was not present  
24          either way. We were excused at that point. Both  
25          counsel and I were excused at that point from

1 Judge Wood's court and we received an e-mail from  
2 Nancy saying sentencing will happen in Rock Hill  
3 City Court at noon the next day before Judge  
4 Lindsey. I appeared. No one from the defense,  
5 neither defendant nor defense counsel, and at  
6 that point there was nothing we could do. I did  
7 want to be heard on the sentence and I made it  
8 clear that I wanted to be heard on the sentence.  
9 At that point we couldn't do anything and then I  
10 got to work I think that next Monday and I was  
11 handed the papers of the appeal.

12 At no point has the City got any notice of a  
13 sentence. I think it was cleared up by your  
14 Court, by Miss Strait cleared it up and actually  
15 asked Judge Lindsey and he apparently just made a  
16 decision without any parties present and gave a  
17 fine I think of 997 or maybe thirty days, or 997.  
18 To my knowledge I don't know if that was ever  
19 entered. I don't know what it was based on.  
20 What we have here and what I wanted to put on the  
21 record, if this were to go any further the fact  
22 that -- despite the fact that the jury didn't  
23 pick a number, I think it is clear that the Court  
24 has to acknowledge that a breathalyzer was taken.  
25 That does make a difference in the fine amount if

1 if you were to so choose to give a fine instead  
2 of the thirty-day sentence.

3 There is issue of forty-eight hours of  
4 mandatory time. None of that has been issued.

5 I do understand that even if we were  
6 standing in front of Judge Lindsey and the  
7 defendant was sentenced that defense counsel was  
8 going to ask for an appeal bond. The City has no  
9 objection to that. I just wanted to lay the  
10 foundation that we do object to how it was  
11 handled. That it was done without anybody  
12 present; the defendant or the City. That we  
13 weren't heard on sentencing. So I just wanted to  
14 make that part of the record. That brought us  
15 here. I think we are here now on the appeal. It  
16 is ripe if a sentence had been put in place and  
17 I am assuming it has, but the City has not  
18 received any record of that.

19 THE COURT: Is that your understanding of  
20 the sentencing?

21 MR. BURNS: I talked to Nancy Butler of the  
22 City the day after we appeared before Judge Wood  
23 in Fort Mill and she said he was going to enter  
24 the sentence because I made it very clear that  
25 Judge Hayes essentially said it is not ripe now.

1 Let it go down for sentencing. I made it clear I  
2 am going to re-file tomorrow. I think he just  
3 said fine, 997 or thirty days. We were told  
4 by the clerk we didn't have to be there. That  
5 the sentence would be entered. It has been  
6 entered. It has gone to the D.M.V.. His license  
7 is suspended. They wouldn't convey that to the  
8 D.M.V. had they not entered the sentencing  
9 conviction.

10 They knew. It was very clear from Judge  
11 Hayes' Order that it was technicality of  
12 sentencing for the appeal to be ripe. And I  
13 believe truly he just entered the sentence based  
14 on I would say sort of indicative of what Judge  
15 Hayes said during our first go around. Without  
16 that first BAC level it would have to be the  
17 bottom level. He didn't rule on that issue.

18 THE COURT: How about the bond issue? He  
19 would have automatically gone to jail or paid a  
20 fine wouldn't he?

21 MR. BURNS: Judge, I file the appeal  
22 immediately thereafter. I was never noticed that  
23 the City had some objection with the sentencing.  
24 I was never served with a Notice of Appeal that  
25 they disagreed with the imposition of the

1 sentence. It is well past the time for them to  
2 challenge it. I just don't think they can come  
3 here today on appeal without even filing an  
4 appeal or cross-appealing and argue anything  
5 about the sentencing.

6 I believe should the appeal be heard and it  
7 is dispositive in favor of the appellant clearly  
8 shouldn't matter anyway.

9 MS. DESCH: Your Honor, if I can submit two  
10 pieces for your review.

11 Your Honor, this is not the essential issue  
12 of the case. But I just I want the record to be  
13 clear. This is a messy case. I was never given  
14 notice of the sentence to begin with. Defense  
15 counsel says he called Nancy Butler. Nancy  
16 Butler told him what Judge Lindsey said. And then  
17 he appealed based on that.

18 I was not part of any of that discussion. I  
19 don't think it is proper that the clerk decides  
20 or conveys the sentence. I do think it is proper  
21 that the parties be before the judge. But all I  
22 can say is put that in the record and leave it at  
23 that. I can't do anything more than that. But  
24 as far as being told not to be there I just  
25 wanted to present this is an actually notice from

1 Nancy Butler to the both of us. As you can see I  
2 did appear. Nobody else did and this is what  
3 Judge Hayes wrote. So if we are talking about a  
4 sentence based on what Judge Hayes wrote I  
5 thought it would be prudent that you actually see  
6 what Judge Hayes wrote. He just basically said  
7 remanded for sentencing. So that is it.

8 I understand this is not the key issue in  
9 the case. I understand that if I were given  
10 notice I would have ten days to appeal. I was  
11 never given notice. But we have bigger fish to  
12 fry, so to speak in this case, but I just wanted  
13 to lay the record that --

14 THE COURT: So, you were never given notice  
15 of the actually sentencing?

16 MS. DESCH: Correct. Until I heard from --  
17 I inquired to the Civil Court how can we proceed.  
18 Why should we proceed if there has been no  
19 sentence issued. We would be at square one if  
20 we came before you yet again without a sentence.

21 So, I was never given notice by Judge  
22 Lindsey.

23 THE COURT: Okay. We will address these as  
24 they appear. Of course, again, I don't have any  
25 record in this case. Is there a record in this

1 case? A transcript?

2 MS. DESCH: Your Honor, we did talk about  
3 that yesterday. I have inquired. I don't know  
4 if you know this, but Judge Lindsey is no longer  
5 the judge in Fort Mill City. Judge Wood has  
6 taken over that position and Nancy Butler has  
7 retired.

8 In the mist of all that is when this  
9 happened. I did ask Mitzi Blackman who has taken  
10 over. When I inquired to the Court if you had  
11 received a transcript, if one existed and frankly  
12 Mitzi is asking anybody that she can think of to  
13 get help from the IT department or to find that  
14 laptop. So, I don't know if we know whether one  
15 exist or not. I do think it would be incredibly  
16 helpful. Although we agree on most things, I  
17 think there is little nuances that defense  
18 counsel and I don't agree on. We don't have to  
19 agree on, obviously.

20 THE COURT: Let me tell you what my concern  
21 is. My concern they based their appeal on, it  
22 is not based on the failure of the jury to make a  
23 finding on the verdict form, or the jury find the  
24 actual alcohol content.

25 You are not making that as a ground on

1 appeal?

2 MR. BURNS: No, Your Honor. My basic  
3 argument is it should never have gone to the  
4 jury.

5 THE COURT: Well, I understand. I want to  
6 be sure.

7 MR. BURNS: That is not --

8 THE COURT: I think your motion there would  
9 be for a new trial.

10 MR. BURNS: Yes, I am not raising that  
11 issue.

12 THE COURT: You are not raising that issue?

13 Mr. Burns: Yes.

14 THE COURT: So we are just dealing with  
15 three issues and then they all involve no video  
16 of the incident site. No audio was included in  
17 the video of the incident site. The  
18 non-arresting officer video of the incident site  
19 does not show the appellant being advised of his  
20 Miranda warnings.

21 Those are your basis for appeal?

22 MR. BURNS: Yes, Your Honor.

23 THE COURT: All right. And you made those  
24 motions at the pretrial and the judge denied them  
25 or during the trial?

1 MR. BURNS: During the trial, yes, sir.

2 THE COURT: And he denied those motions.

3 MR. BURNS: Yes, Your Honor.

4 THE COURT: See, that's the problem I  
5 got. I don't know what he had before him and  
6 why he denied them and the only thing he says in  
7 his return he made his motion and I denied him.  
8 I don't have anything to show what was actually  
9 done or what evidence there was. I mean, was  
10 there some reason that these weren't provided or  
11 were they provided and the judge disagreed the  
12 audio wasn't there or the Miranda warnings were  
13 not given or whatever.

14 MS. DESCH: I think on his return he does  
15 say that in his view the Miranda -- the  
16 giving of the Miranda was shown. And I will be  
17 candid Your Honor, essentially what happened is  
18 a sergeant from the county was driving through  
19 Fort Mill and he sees a car come off the road and  
20 swerve in front of him. He follows him for a  
21 little bit. The camera is on and you can see the  
22 car weaving back and forth. He initiates his  
23 blue lights. He pulls the car over. He already  
24 has a person in the car with him and he calls for  
25 -- as they turn on to Main Street in Fort Mill

1 and around to I think Tom Hall or somewhere in  
2 that area, he calls for Fort Mill PD. They are  
3 able to get out there pretty quickly and at that  
4 point Sergeant Boon is the one with county  
5 jurisdiction. He pulls him over to get him to  
6 stop driving recklessly in city limits. He pulls  
7 him over. He goes out. He has an interaction  
8 with the defendant and gets his license. Comes  
9 back and at that point the Fort Mill police  
10 officer comes on scene.

11 Your Honor, the main issue of this case is  
12 Fort Mill, the officer did not have video in his  
13 car from Fort Mill PD. But knowing that and  
14 knowing the issues with Roberts, as I am sure you  
15 have seen before you, the Fort Mill PD can not  
16 say we are not putting videos in my car to not  
17 comply, so the officer was aware of that.

18 Sergeant Boon stayed on scene. He kept his video  
19 on the entirety of the incident. Unfortunately  
20 when he goes back to his car his mic went with  
21 him. The officer not being cognizant of the  
22 fact the audio wasn't catching because he knew  
23 that the video was catching.

24 He continues with the investigation. Pulls  
25 the defendant out of the car. Performs field

1           sobriety, which is the HGN walk and turn and the  
2           one-legged stand.

3                       He then at that point determines to arrest  
4           the defendant for driving under the influence.  
5           He turns around. He places handcuffs on him. He  
6           pulls out a Miranda card. He shines his  
7           flashlight on it and he reads from Miranda. Of  
8           course you can't hear that. You can see it and  
9           he testified to it in Court and he even put in a  
10          copy of his Miranda card and signed it as  
11          submission to the Court and to the defense that  
12          this what I read from and he did the same  
13          thing in front of the the jury to show this is  
14          what I did. I pulled it out. This is me. And  
15          he pointed out in the video, this is me reading  
16          the Miranda card at this point.

17                      The defendant is taken from the scene. He  
18          is placed in Fort Mill PD officer's car and taken  
19          back for the breathalyzer. Nothing inherently  
20          wrong with the video room tape. There has been  
21          no objection to that at all.

22                      So what we are faced with here is the City's  
23          argument is we have complied with "A", the  
24          conduct is captured in its entirety and the video  
25          was produced for the defense. The defense's

1 argument is that we have not. And I will let him  
2 do that. But that is where we are.

3 Of course it would help for you to see that  
4 and hear that and I wholeheartedly agree and we  
5 can continue to see if it even exists. But I  
6 think we don't necessarily disagree with too  
7 much. We have to concede there is no audio on  
8 the tape and we have to concede there is no sworn  
9 affidavit. From there we just have our legal  
10 arguments based on what we would present to you.

11 THE COURT: I will hear from you, but I am  
12 just thinking through that.

13 All right. Go ahead.

14 MR. BURNS: Thank you, Your Honor.

15 I don't disagree with most of those facts  
16 and I wish to argue on those facts as she pretty  
17 much stated.

18 As you heard, sheriff's deputy pulled my  
19 client over and he had a defendant from another  
20 arrest in the back of his car. He radioed or  
21 called for Fort Mill PD to arrive. Fort Mill PD  
22 showed up and at that point the sheriff's deputy  
23 Sheriff Boon got back into his car.

24 Your Honor has recently handed an opinion on  
25 State v Landis and my argument during the trial

1 or at trial was that this was spot on with  
2 Landis. You are aware of that case. State  
3 transport officer pulled him over but it was  
4 highway patrolman who did the field sobriety  
5 test, who placed him under arrest and took him  
6 and did the data master. Exact same thing here.  
7 Deputy pulled him over, but shortly thereafter as  
8 counsel said, Fort Mill arrived. It was Fort  
9 Mill who performed the field sobriety test. He  
10 placed him under arrest. He took him in and he  
11 administered the field sobriety test. So I would  
12 say spot on, with Landis. And in Landis the  
13 Supreme Court says that, it is the arresting  
14 officer who must comply with section 56-5-2953  
15 and they go on to define in that case that it was  
16 the state trooper who performed all these things,  
17 was the arresting officer, and not the transport  
18 officer. And I think that is exactly what we  
19 have here. Exactly. And during the trial the  
20 officer for the City of Fort Mill produced no  
21 video from his car. And he produced no sworn  
22 affidavit. At that point I moved to dismiss  
23 based on violation of the video recording  
24 statute.

25 If you look at the brief I handed up, the

1           very last page is the affidavit that they sent to  
2           me on the issue. And if you will notice at the  
3           bottom it was never sworn.

4           I raised this issue with Judge Lindsey and  
5           you know maybe it would have been different even  
6           based on Your Honor's decision recently had they  
7           gone back and fixed it. But it was still never  
8           fixed. They never produced a sworn affidavit.  
9           So based on Landis the arresting officer never  
10          provided a sworn affidavit and have violated the  
11          video recording statute. But on the same side of  
12          that same coin, to say that the deputy's video is  
13          sufficient I think also violates because he got  
14          back in his car and you couldn't hear the field  
15          sobriety tests. And the statute says that it  
16          must include his conduct. And conduct would  
17          clearly be -- and by the officer's testimony, the  
18          way he sounds. Is he slurring. The way he  
19          speaks. Part of every field sobriety test is  
20          whether they count currently. And that evidence  
21          is used against him. And I believe that would be  
22          conduct that was not shown on the deputy's video.  
23          So, even assuming that is correct, and I am just  
24          saying assuming that, then the deputy should have  
25          provided a sworn affidavit to explain why it

1 didn't have any audio to it. So either way the  
2 video recording statute was never complied with,  
3 by presenting a sworn affidavit in either case  
4 and it clearly violates the 56 (B) and I believe  
5 the conviction should be overturned based on the  
6 violation of that.

7 We went on in the pretrial about, whether or  
8 not you could see the arresting officer read  
9 Miranda. He was standing behind him. You can  
10 see him moving around and show a flashlight but  
11 you couldn't see what he was doing. Maybe it  
12 shows it. Maybe it doesn't. I don't think it  
13 does. I can see how that is up to  
14 interpretation. You surely can't hear it. But I  
15 just don't think we get that far based on the  
16 fact that none of the people who either they  
17 didn't provide a video and didn't provide a sworn  
18 affidavit or they did provide a video and they  
19 still didn't provide a sworn affidavit as to why  
20 it didn't include all of his conduct.

21 Based on that reason I believe it should be  
22 overturned.

23 THE COURT: The officer's signature, that is  
24 part of your brief, is that the City of Fort Mill  
25 officer saying it wasn't operating?

1 MS. DESCH: Yes, sir.

2 THE COURT: Am I to understand he didn't  
3 have one in the car?

4 MS. DESCH: That's correct.

5 THE COURT: Of course it wasn't operating  
6 if he didn't have one in his care and that is not  
7 and acceptable excuse.

8 MS. DESCH: Well, let me -- I don't know the  
9 answer to that. I know that Fort Mill has had a  
10 bevy of problems.

11 THE COURT: Again, I don't have the benefit  
12 of what the trial judge had.

13 MS. DESCH: Right.

14 THE COURT: I don't know what was presented  
15 to him at the time. That is where I am at. Of  
16 course this affidavit is not in proper form. But  
17 it would make a big difference as to whether it  
18 was in inoperable condition and failed to be  
19 maintained or didn't have one at all on his car.  
20 But under Roberts I think he didn't have one at  
21 all on his car. I don't think he can even raise  
22 that defense.

23 MR. BURNS: I started to see a trend in that  
24 to the point that I threw my hands up and started  
25 getting subpoenas duces tecum. I said I want to

1 see these records to see how they are maintained  
2 because I am getting a lot of affidavits with no  
3 video. So, there was nothing ever presented as  
4 to why he didn't have a video. It was simply I  
5 just don't have one.

6 THE COURT: Miss Desch started off by saying  
7 that he didn't have one in the car and that  
8 wasn't acceptable under Roberts and I agree.

9 MR. BURNS: Yes, sir.

10 THE COURT: So if he didn't have one,  
11 period, that is one thing. If he had one that  
12 was in inoperable condition and provides an  
13 affidavit and reasonable efforts had been made  
14 then that, you know, if they can establish  
15 reasonable efforts had been made. Was there any  
16 testimony on that?

17 MR. BURNS: No, Your Honor.

18 THE COURT: What had been done to maintain  
19 them or whether he had one or not?

20 MR. BURNS: It never even came up. I argued  
21 this point and essentially counsel's argument was  
22 we have a video from the deputy and that doesn't  
23 even matter as to why Fort Mill doesn't have one.  
24 And Judge Lindsey agreed with that and he pretty  
25 much says so in his return.

1 I think it can be seen that was his ruling  
2 from his return that yet Fort Mill doesn't have  
3 one, but it doesn't matter at all. It wasn't  
4 even brought up. We got this video over here  
5 from the sheriff's deputy and that is good enough  
6 and that is basically how it was left.

7 THE COURT: Not if it is inadequate. And it  
8 is inadequate because he didn't have his mic in a  
9 place where you could hear.

10 MR. BURNS: Yes, sir.

11 THE COURT: You know if you can hear  
12 everything that was done and see it all I might  
13 agree with that position. But if the reason you  
14 couldn't hear it is because the deputy was back  
15 in his car and therefore it was ineffective to  
16 get the audio part of it then it is not an  
17 effective substitution, it appears to me, that  
18 meets the requirement.

19 MS. DESCH: Your Honor, I understand. I  
20 can see where you are going with this, but could  
21 I just respond to the argument.

22 THE COURT: Sure. Of course. Of course.

23 MS. DESCH: Your Honor, I think what we are  
24 faced with here is the fact that -- and to give  
25 you a history which I don't know that you need to

1 know this, but counsel has made sort of this --  
2 he has thrown up his hands with Fort Mill. The  
3 history with Fort Mill is essentially this. They  
4 spent a lot of money in putting in video cameras  
5 in their cars. Little by little those cameras  
6 started -- because back when they changed all the  
7 laws the department of public safety when  
8 they changed all the laws and made this big hit  
9 on DUI across the state the Department of Public  
10 Safety said don't worry about it. We will  
11 provide all this money to the departments to make  
12 sure you have them and that is why Roberts is so  
13 important. Roberts is so important because  
14 despite that movement the town said we don't want  
15 to comply with this new rule. We are just not  
16 going to put videos in our cars. Well, the judge  
17 at that point said, well, you know what, you  
18 just can't do that ad nauseam. At some point you  
19 got to remedy the problem and you got to comply.  
20 It is inexcusable to prolong this and not comply  
21 with the statute.

22 Fort Mill PD on the other hand put videos in  
23 their cars and they spent a whole lot of money  
24 doing this and as these videos were breaking in  
25 the cars the powers that be were trying to remedy

1 the issue by going back to manufacturer and  
2 saying you need to fix this because we need to be  
3 able to videotape these cars to be able to  
4 comply. So basically as one would break they  
5 would try to get it fix and then they would send  
6 another car out. So essentially they were  
7 fighting this battle. Instead of just spending  
8 more money and putting in different videos they  
9 were fighting this battle. But what they were  
10 trying to do is get the cameras in the car and  
11 this is what has been going on for the last two  
12 years. And so little by little they would have  
13 one car and a Sergeant would try to get to the  
14 scene if the Sergeant had the video to make sure  
15 something was captured. Well, this is becoming a  
16 problem because more and more times. So at some  
17 point you know it was excusable if you could  
18 explain what was wrong with the video. So all  
19 the cars to my knowledge should have video, but  
20 most of them do not work. And so this is the  
21 problem and the officers would come off the road  
22 and they would report it to their superiors and  
23 the superiors would continue this battle  
24 against the manufacturers of the video. And  
25 finally BJ Kennedy said we can't continue to

1 do this. We are not effective on the streets.  
2 We are losing cases in court. So he went back  
3 actually to the VHS system until they could get  
4 something put in place that was more proper. So  
5 Fort Mill PD has been attempting to do that.  
6 Whether it is the right remedy or not, I don't  
7 know that we have the answer for that. But they  
8 were attempting to.

9 So in this particular case, I honestly don't  
10 remember if Officer Barrett said that his was not  
11 working or not because it became incredibly clear  
12 at the onset of this case that the affidavit was  
13 not sworn. So at that point we were faced with  
14 the evidence as it proceeded.

15 This was not done in a motion in limine  
16 prior to and it was purposely not done because  
17 the defense wanted to and has admitted. I am not  
18 talking out of court. He admitted he wanted to  
19 wait until the jury was sworn if the court ruled  
20 in his favor then double jeopardy would have set  
21 in.

22 It was at that point where the Sergeant's  
23 video was being placed in evidence. The defense  
24 objected to the admission of the video based on  
25 these violations. So the technical preservation

1 of the appeal issue I don't know if that is a  
2 proper technical submission of it, but he  
3 objected to it going in. The arguments were  
4 heard. The case law was presented and he relied  
5 very heavily on Landis. But I would like to  
6 point that Landis is different in some way.  
7 Landis is all about the arresting officer. Who  
8 is the defining officer in the sworn affidavit.  
9 But in Landis there is no video at all. So then  
10 you are dealt with the fact that they have to  
11 rely on B because they have not complied with A.  
12 There is nothing caught on tape. And so we would  
13 argue it is different here. That in "A" it  
14 doesn't say the arresting officer has to provide  
15 a video or anything about who has to provide it.  
16 It just says conduct must be captured on video.

17 From that premise, Your Honor, I would like  
18 to present some case law and really --

19 THE COURT: Have you got a copy of Landis  
20 with you.

21 MR. BURNS: I do, Your Honor.

22 THE COURT: Let me look at it.

23 MR. BURNS: And I am actually trying to find  
24 it where they actually come right out and say  
25 that therefore it is the arresting officer who

1 must comply with 56-5-2953.

2 MS. DESCH: What I said is they define  
3 arresting officer in the case.

4 (Document handed to the Court.)

5 MS. DESCH: I will give you a moment to get  
6 through that and then I will continue with that.

7 MR. BURNS: Right off the bat, Your Honor --

8 MS. DESCH: I didn't say I was done arguing.

9 THE COURT: In actuality Landis predates the  
10 current law. The old law was that you had to  
11 video conduct. I think that is when Landis was  
12 in effect. The new law that passed in 2009, 2010  
13 whatever, it says you got to video. Period. It  
14 doesn't say you got to video the field sobriety  
15 test, et cetera, and giving them Miranda  
16 warnings. It does not say conduct any more. So  
17 back then you kind of have had a different  
18 standing.

19 There was a case that dealt with that. I  
20 don't think it was Landis. There was a case that  
21 dealt with that, that said, you know, under the  
22 new statute that would be -- our opinion might be  
23 different. In the footnote they said that. Under  
24 the new law. But we are under the old law which  
25 only requires conduct. But the new one -- am I

1 correct about that or am I mistaken.

2 MR. BURNS: No, Your Honor I have a copy  
3 from Lexus. I can hand this up.

4 THE COURT: Yes, sir.

5 (Document handed to the Court.)

6 MR. BURNS: But it states must have his  
7 conduct at the incident site.

8 THE COURT: Is this the new statute?

9 MR. BURNS: Yes, Your Honor.

10 MR. BURNS: And I am sorry, I scribbled on  
11 that one, but that is the only copy I have with  
12 me.

13 THE COURT: Maybe I am just reversing it  
14 then. They said under the new statute.

15 MR. BURNS: But, Your Honor on the flip side  
16 of that same coin if the video from the deputy  
17 was sufficient he got back in his car and there  
18 is no audio, then he should have provided an  
19 affidavit as to why there was no audio on it.

20 MS. DESCH: I will address that if I am  
21 allowed to continue my argument.

22 MR. BURNS: I am sorry.

23 THE COURT: Go ahead counsel.

24 MS. DESCH: Your Honor, I presented to you a  
25 few cases and Orders from our Circuit and from

1 the Supreme Court, and I know the Orders that are  
2 produced for our Circuit Court judges, by you and  
3 Judge Hayes are not precedent setting, but I  
4 looked for as much guidance in this as we could  
5 possibly get and there is a couple of cases that  
6 have come through and so essentially the premise  
7 of my argument if I can try and make it as clear  
8 as possibly, is that if the city -- or the State  
9 complies with "A", then we don't even need to get  
10 to "B". In all of the cases that I presented and  
11 that are relied on by this defense counsel and  
12 many defense counsel that have appeared before  
13 you in the last year and a half the essential  
14 outline is, they relied on Suchenski in that  
15 case no video. Landis, no video at all. In  
16 several of these cases there is no video at all.  
17 And so they have to rely on "B" or they had to go  
18 to "B". And even Suchenski which we all rely on  
19 now, as the case went up they said nobody  
20 preserved these exceptions in "B" so we don't  
21 even need to get to it and yet that is what is  
22 before all the courts as what everybody is now  
23 relying on.

24 So the argument there is, the exceptions in  
25 B not addressed in Suchenski but addressed by

1 many Circuit Court judges and the Court of  
2 Appeals and Supreme Court, in B there is a  
3 catchall. But beginning with "A", Your Honor,  
4 what I presented to you is several orders  
5 including Lois Scott from Judge Hayes February  
6 7th of this year. Stephanie Langum (phonetics)  
7 and I apologize if I am butchering that. That  
8 was written by you in June of this year. Carl  
9 Sullivan another Order by Judge Hayes.

10 I think the one issue on Sullivan that I  
11 wanted to bring to the Courts attention in that  
12 case you could hear but could not see and Judge  
13 Hayes very clearly said show conduct means show.  
14 You should be able to see it and in that case  
15 that was dispositive of that particular case. In  
16 ours we now have the opposite. You can see  
17 Miranda being given and can you see the conduct  
18 that is captured. So we would argue in line with  
19 Judge Hayes' thoughts in Sullivan that according  
20 to the plain language of the statute that you can  
21 in fact see. And I would say to show conduct we  
22 have to look at the plain language as you know  
23 that that includes the noun version and the  
24 verb version. And I think it is easy for the  
25 opposite to come in or the person arguing against

1 the statute to say, well, I don't hear the words.  
2 Well frankly, even if you had audio you are not  
3 seeing. You are not seeing the words. The  
4 words are not -- it is not a cartoon where the  
5 words kind of go up in a bubble. And I know  
6 that sounds kind of like a ridiculous argument  
7 but the word show has been expanded so much to  
8 include some things it is becoming impossible to  
9 get back to the legislative intent which we  
10 should be looking at the legislative intent as  
11 the plain language of the Court and I think that  
12 is the underlying factor in all these orders  
13 before you.

14 Your Honor, I also included an Order from  
15 Judge Addy, and I thought it was actually the  
16 closest I could find on this particular issue and  
17 if you look and that is for the record, that  
18 is Victor Raper Irvy versus State of South  
19 Carolina, 2011-CP-24-593. It was heard before  
20 the Honorable Frank Addy Jr.

21 Your Honor, on page two, of that Order, in  
22 this particular case there was a -- the Order  
23 was from 2011, but it is unclear as to what it  
24 might have been the old statute. But essentially  
25 what we have here is that the judge was faced

1 with a problem. The incident site videotaping  
2 is missing all of Mr. Irby's verbal contact while  
3 Mr. Irby was placed in the arresting officer's  
4 patrol car and being arrested. This was probably  
5 the closest I could find. We have a video but  
6 the audio is missing. And in Judge Addy's  
7 analysis of it, and again not precedential in any  
8 way. Just looking for guidance in this issue.  
9 It says the arresting officer produced the  
10 incident site video tape required in subsection  
11 "A". The incident site video tape that was  
12 produced doesn't meet the mandates established in  
13 "A" for what must be seen and heard in the  
14 incident site video tape.

15 Therefore he can not use an affidavit  
16 produced pursuant to subsection "B" to excuse the  
17 deficient incident site video tape because an  
18 incident site video tape has in fact been  
19 produced. The pertinent issue in the State's  
20 right to use the incident site video tape that  
21 was produced.

22 "A" says it is mandatory as to what must be  
23 shown and heard. And "A" says it is mandatory  
24 that conduct be captured including field  
25 sobriety, if they are given and the showing of

1 the Miranda rights.

2 "B" reticent in its totality addresses how  
3 the Court proceeds in the absence of a video  
4 tape. And Judge Addy says subsection "B" does  
5 not purport to cure the State's failure to comply  
6 with "A" when a video tape is in fact produced.  
7 If that were the case "A" would have no value.  
8 The problem -- so, essentially this did end up  
9 candidly in a dismissal, but not for that reason.  
10 And it really captures, if we comply with "A" and  
11 produce a video even if Officer Bear, the  
12 arresting officer, produced an affidavit it  
13 doesn't -- "B" does not allow for that. We  
14 produced "A" and complied with "A" by producing  
15 a video. It doesn't say it has to be Officer  
16 Bear's. It just says video that captures the  
17 conduct of the defendant.

18 Based on this analysis, we don't have the  
19 luxury of then going to "B" and using it  
20 essentially as back-up plan. We complied with  
21 "A" and that is the City's position. That we  
22 complied with "A" by capturing the conduct and  
23 there is no guidance as to what to do if you can  
24 not hear.

25 And finally Your Honor, before you is a case

1 that just came out. It is a felony DUI case.  
2 State versus Christopher Manning. It is in the  
3 Court of Appeals. Appellant case number  
4 2010-161686. It is an appeal from Lexington  
5 County.

6 Your Honor, I think this is most  
7 dispositive of where the Courts are now going  
8 with this statute and where the legislative  
9 intent is in putting this statute in this way.  
10 The plain language discussed in this case, Your  
11 Honor, this is a case where it was a felony DUI.  
12 The person was air lifted or taken out from the  
13 accident to the hospital immediately before  
14 police were even on seen. The police had no  
15 interaction with him whatsoever. They also  
16 failed to produce a video. They had no  
17 interaction action, so they failed to produce a  
18 video. In this case they also failed to produce  
19 an affidavit even explaining. And clearly in "B"  
20 I think there is no question that accidents,  
21 extrinsic circumstance would fall under exception  
22 of "B". But in this particular case they didn't  
23 even do that. They didn't comply with "A" and  
24 think didn't comply with "B" and yet the appeals  
25 Court says, given the totality of the

1           circumstances the legislative intent and the  
2           plain language that that is not a reason to  
3           dismiss the case. And in this case I would use  
4           this most certainly in our case. In this  
5           particular case, on page it is marked 240 in my  
6           hand out. Section 56-5-2953 allows the Circuit  
7           Court to look at the totality of the  
8           circumstance and make a determination as to  
9           whether the charges should be dismissed. So Your  
10          Honor, based on all of those things and looking  
11          for any guidance from anybody that addressed  
12          it, this particular issue was novel to Judge  
13          Lindsey, he admitted so in his return. But what  
14          he was presented with in his return and the trial  
15          Court was given a video and in his return he says  
16          that it has complied and the reason he denied the  
17          motion to dismiss is because it complied with "A"  
18          in that the conduct was included and the conduct  
19          was shown in the video that was presented to  
20          him.

21                 So to be clear we would ask that we have  
22          complied with "A". That even if there is no  
23          audio there is no way to fix it with "B" and that  
24          based on to the totality of the circumstances the  
25          Circuit Court has the right to look at all of

1           those issues.

2           Judge Bear (sic) attempted to comply as best  
3           he could given the circumstances and we would ask  
4           that you deny this appeal.

5           THE COURT: All right. I will take it  
6           under advisement and look at it.

7           MS. DESCH: Thank you, Your Honor.

8           MR. BURNS: Thank you.

9

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\* \* \* \* \*  
(END OF TRANSCRIPT)

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C E R T I F I C A T E

I, the undersigned Aileen Butler, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for York County, South Carolina, on the 7th day of September, 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 28, 2012.

Aileen Butler

2012-CP-46-1625  
44

THE STATE OF SOUTH CAROLINA  
In The Court of Common Pleas

APPEAL FROM CITY OF FORT MILL  
MUNICIPAL COURT

Peter Lenzi, Municipal Court Judge

Case No. 2012-CP-46-1625

The City of Fort Mill,

Respondent,

v.

Colin Duane Fitzgerald,

Appellant.

NOTICE OF

APPEAL

April 30, 2012

FILED-RECEIVED  
2012 MAY - 18 PM 2: 17  
DAVID HAMILTON  
C.C.P. & S.  
YORK COUNTY, SC

The Defendant, Colin Duane Fitzgerald, does hereby through his attorney make an Appeal to the Court of Common Pleas of York County for his conviction for the charge of Driving with an unlawful Alcohol Concentration. This Court has Jurisdiction over this matter pursuant to S.C. Code Ann. § 14-25-95 (1976 as Amended) and *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332 (S.C. 2011).

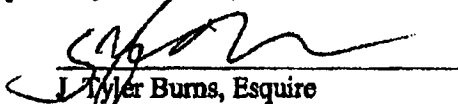
#### ISSUES ON APPEAL

- 1.) The Court erred in not dismissing the case for failure by the Arresting Officer to comply with S.C. Code Ann. § 56-5-2953(B) to provide a sworn affidavit to explain why no video of the incident site could be provided.
- 2.) The Court erred in not dismissing the case for failure of the non-arresting officer comply with S.C. Code Ann. § 56-5-2953(B) to provide a sworn affidavit to explain why no audio was included in his video of the incident cite.
- 3.) The Court erred in not dismissing the case for violation of S.C. Code Ann. § 56-5-2953 in that the video at the incident cite does not show the Appellant being advised of his Miranda warnings.

#### CONCLUSION

Therefore, the Appellant prays this Court reverse his conviction from the Municipal Court.

Respectfully Submitted,

  
Tyler Burns, Esquire  
Reeves, Aiken and Hightower, LLP  
Post Office Box 1297  
Fort Mill, South Carolina 29716  
Telephone: (803) 548-4444  
Facsimile: (803) 548-7050

ATTORNEY FOR APPELLANT


April 30, 2012  
Fort Mill, South Carolina

2012-CP-46-1625

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Certificate of Service

I certify that the above document has been served on Municipal Court and the Agent for the Prosecuting Agency as required in S.C. Code Ann. §18-3-30.

  
April 30, 2012

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DAVID HAMILTON  
C.C.C.P. & S.S.  
YORK COUNTY, SC

THE STATE OF SOUTH CAROLINA  
In The Court of Common Pleas

APPEAL FROM CITY OF FORT MILL  
MUNICIPAL COURT

Peter Lenzi, Municipal Court Judge

Case No. 2012-CP-46-1625

The City of Fort Mill, Respondent,  
v.  
Colin Duane Fitzgerald, Appellant.

APPELLANT'S BRIEF

April 30, 2012

FILED-RECEIVED  
2012 MAY -18 PM 2:18  
DAVID HAMILTON  
C.C.P. & S.  
YORK COUNTY, SC

The Defendant, Colin Duane Fitzgerald, does hereby through his attorney make an Appeal to the Court of Common Pleas of York County for his conviction for the charge of Driving with an unlawful Alcohol Concentration be over turned and the case dismissed. This Court has Jurisdiction over this matter pursuant to S.C. Code Ann. § 14-25-95 (1976 as Amended) and *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332 (S.C. 2011).

#### **ISSUES ON APPEAL**

- 1.) The Court erred in not dismissing the case against Appellant on the grounds that the Arresting Officer failed to comply with S.C. Code Ann. § 56-5-2953(B) by providing at trial a sworn affidavit to explain why no video of the incident site could be provided.
- 2.) The Court erred in not dismissing the case against Appellant on the grounds that the non-arresting officer failed to comply with S.C. Code Ann. § 56-5-2953(B) by providing a sworn affidavit to explain why no audio was included in his video of the incident cite.
- 3.) The Court erred in not dismissing the case against Appellant for violation of S.C. Code Ann. § 56-5-2953 on the grounds that the non-arresting officer's video of the incident cite does not show the Appellant being advised of his Miranda warnings.

#### **STATEMENT OF THE FACTS**

On October 9, 2011, Sgt. Boone with the York County Sheriff's Office initiated a traffic stop, within the city limits of Fort Mill, on an SUV driven by Appellant. Because Sgt. was already detaining a suspect from a previous unrelated arrest, Sgt. Boone requested Fort Mill Police Department take over the traffic stop. Shortly thereafter, Officer Baird with the FMPD arrived on the scene and took over the traffic stop. Officer Baird removed Appellant from the car, conducted field sobriety tests, and placed Appellant under arrest for Driving under the Influence. Officer Baird took Appellant into custody and transported Appellant to FMPD where Appellant was offered a breath test.

This matter came to Jury trial on April 23, 2012 in the Municipal Court for the city of Fort Mill. The City elected to proceed to trial on the charge of DUAC rather than the initial charge of DUI. Previous to trial, Counsel for the Appellant made motions in

limine to dismiss the charges on several grounds involving the video. Because of a malfunction with his video equipment, Officer Baird was not able to produce a video of the incident site. The only video provided came from Sgt. Boone's patrol car. Counsel for the Appellant moved to dismiss for violation of S.C. Code Ann. § 56-5-2953(A) because Officer Baird positioned himself in such a way that Officer Baird was blocked from the view of Sgt. Boone's camera and the video did not show the Appellant being advised of his Miranda warnings. The Trial Court denied this motion and the matter proceeded to trial. At trial, Counsel for the Appellant moved to dismiss for violation of S.C. Code Ann. § 56-5-2953(B), because Officer Baird, as the arresting officer, failed to submit a sworn affidavit setting forth the reasonable efforts he took to maintain his equipment in an operable condition. Officer Baird did submit a template form affidavit that simply said he took reasonable efforts to maintain his equipment in an operable condition. However, the affidavit submitted by Officer Baird was not sworn, but merely signed by the Officer. Counsel for the Appellant also moved to dismiss for S.C. Code Ann. § 56-5-2953(B), because Sgt. Boone submitted no sworn affidavit explaining why his video of the incident site contained no audio. Both motions were denied and the Appellant was found guilty of Driving with an Unlawful alcohol Concentration.

However, despite the Jury returning a verdict of guilty as to the underlying charge, the Court never instructed the Jury that the Jury must also make a determination of fact for sentencing purposes, as to what the Appellant's breath alcohol concentration was at the time Appellant was driving. The Jury never made such a finding of fact as to the Appellant's BAC and the jury was released from service. Because the Jury never made such a finding of fact, the Appellant was not sentenced. Without motion from either side, the Court moved and ruled Sua Sponte to grant a mistrial. Counsel for the Appellant never moved for a mistrial and maintained that the Jury needed to make the finding of fact as to the Appellant's BAC.

#### **ISSUES ON APPEAL**

Despite the fact that the Jury never made a finding of fact as to the Appellant's BAC, the Jury did return a verdict of guilty on the charge of DUAC. Driving with an

Unlawful Alcohol Concentration cases are bifurcated proceedings where the Jury first determines guilt or innocence and then makes a finding of fact as to the sentence. The fact that the Jury did not make a finding of fact for sentencing purposes does not negate the entire conviction of the underlying charge. Nor is the conviction set aside under the "clean slate rule" because the Appellant did not ask or move that the conviction be set aside. Just as in the bifurcated structure of a capital proceeding, the only matter left to be determined by a Jury would be the sentencing range and not the issue of guilt. *State v. Stewart*, 288 S.C. 232, 235 (S.C. 1986). Therefore, since the Appellant has been convicted of the underlying offense, Appellant makes this timely appeal as the underlying errors of the Court that led to conviction are ripe for review as a retrial at this point would only address the matter of sentencing.

**The Court erred in not dismissing the case against Appellant on the grounds that the Arresting Officer failed to comply with S.C. Code Ann. § 56-5-2953(B) by providing at trial a sworn affidavit to explain why no video of the incident site could be provided.**

At trial, Counsel for the Appellant argued that this case is directly on point with the case of *State v. Landis*, 362 S.C. 97, 101 (S.C. Ct. App. 2004). In the *Landis* case, Landis was initially pulled over by a State Transport Officer. However, shortly after the Transport Officer initiated the stop, a State Trooper arrived. The State Trooper removed Landis from his car, performed the field sobriety tests, and placed Landis under arrest. In the *Landis* decision, the Court of Appeals held that it is the "arresting officer" that has to be in compliance with § 56-5-2953(B). Since the State Trooper removed Landis from his car, gave Landis field sobriety tests and placed Landis under arrest, the Trooper is considered the arresting officer under § 56-5-2953(B).

These facts are almost the same facts involved in the present case. Officer Baird removed Appellant from his car, gave Appellant field sobriety tests, and placed Appellant under arrest. Under almost exactly the same factual situation, the *Landis* opinion would consider Officer Baird is the arresting officer responsible for compliance with § 56-5-

2953(B).

§ 56-5-2953(B) states that "Failure by the arresting officer to produce the video recording required but this section is not alone grounds for dismissal... if the arresting officer submits a sworn affidavit certifying that the video recording equipment... was in an inoperable condition." As the arresting Officer, Officer Baird was responsible for complying with § 56-5-2953. However, Officer Baird never submitted a sworn affidavit and only submitted an unsworn form signed by Officer Baird. (Appellant's exhibit #1). As a result of this failure by Officer Baird to comply with § 56-5-2953(B), the appropriate remedy should have been dismissal of the case under *City of Rock Hill v. Suchenski*, 374 S.C. 12 (S.C. 2007).

**The Court erred in not dismissing the case against Appellant on the grounds that the non-arresting officer failed to comply with S.C. Code Ann. § 56-5-2953(B) by providing a sworn affidavit to explain why no audio was included in his video of the incident cite.**

Appellant contends that *Landis* is controlling in the present case and should have been dismissed because the arresting officer failed to comply with § 56-5-2953(B). However, the Trial Court took the position that *Murphy v. State*, 709 S.E.2d 685 (Ct. App. 2011) was controlling in the present matter. (Appellants exhibit #2). According to the Order issued by the trial Court, "the video produced by Sgt. Boone satisfies the statutory requirement." Should the position of the Trial Court be correct, then the Court erred in not dismissing this case for failure by Sgt. Boone to comply with § 56-5-2953(B).

Immediately after making contact with the Appellant, Sgt. Boone returned to his patrol car, where he remained until Officer Baird left with Appellant to go to FMPD. Because Sgt. Boone sat in his patrol car, there was no audio on the video provided by Sgt. Boone. Appellant maintains that if Sgt. Boone's video should meet the statutory requirement, then Sgt. Boone should have provided an affidavit to explain the lack of audio. § 56-5-2953(A) states that the video must include the conduct of the defendant and any field sobriety tests if any are administered. The manner in which the Appellant spoke to Officer Baird, along with how the Appellant physically appeared, is part of the conduct

required to be on video. In addition, two out of the three field sobriety tests administered to Appellant required Appellant to count aloud while performing some other task. At trial, Officer Baird testified that the manner of counting could be considered clues in determining whether the Appellant was impaired. By his own testimony, it is clear that Officer Baird considers the manner the Appellant counted as part of the field sobriety tests. Since these portions of the field sobriety tests are not on the video, this video would also violate § 56-5-2953.

The Appellant again maintains that it was Officer Baird that must be in compliance with § 56-5-2953(B). However if the position taken by the trial court is correct, then this case should have still been dismissed for failure by Sgt. Boone to comply with § 56-5-2953(B) by submitting a sworn affidavit at trial explaining the lack of audio on his video.

**The Court erred in not dismissing the case for violation of S.C. Code Ann. § 56-5-2953 in that the non-arresting officers video at the incident cite does not show the Appellant being advised of his Miranda warnings.**

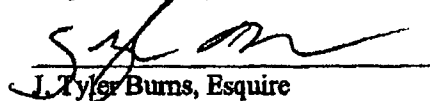
Even if Sgt. Boone's video of the incident site is sufficient to excuse Officer Baird failure to comply with § 56-5-2953, which Appellant contends it does not, this case should have still been dismissed because the video does not show Appellant being advised of his Miranda warnings. At the time of the Appellant's arrest, Officer Baird positioned himself behind the Appellant, which block the camera's view of Officer Baird. As a result of his position behind Appellant, it is not possible to tell whether Officer Baird ever advised Appellant of his Miranda warnings. In *Sullivan v. State*, Case No: 2010-CP-46-3355, the Honorable Judge John C. Hayes III held that "the word show means something that one views or at what one looks and at the same time hears". Because Officer Baird is behind the Appellant, it is impossible to tell whether Officer Baird ever advised Appellant of his Miranda warnings. In addition, because the video has no audio, it would be mere speculation to even guess whether the video shows Appellant being advised of his Miranda warnings.

Because the video does not show Officer Baird advising the Appellant of his Miranda warnings and because Sgt. Boone's video does not contain audio of the Appellant being advised of his Miranda warnings, at the absolute minimum, both Officers should have submitted sworn affidavits. However, neither Officer did submit a sworn affidavit and as a result under *Rock Hill v. Suchenski*, 374 S.C. 12 (S.C. 2007), the case against the Appellant should be dismissed.

**CONCLUSION**

Therefore, for the above mentioned reasons, the Appellant prays this Court reverse his conviction from the Municipal Court.

Respectfully Submitted,


  
\_\_\_\_\_  
J. Tyler Burns, Esquire  
Reeves, Aiken and Hightower, LLP  
Post Office Box 1297  
Fort Mill, South Carolina 29716  
Telephone: (803) 548-4444  
Facsimile: (803) 548-7050

ATTORNEY FOR APPELLANT

April 30, 2012  
Fort Mill, South Carolina

Certificate of Service

I certify that the above document has been served on Municipal Court and the Agent for the Prosecuting Agency as required in S.C. Code Ann. §18-3-30.

  
\_\_\_\_\_  
April 30, 2012

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DAVID HAMILTON  
C.C.P. & S.S.  
YORK COUNTY, SC

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DAVID HAMILTON  
C.C.P.&G.S.  
YORK COUNTY, SC

THE STATE OF SOUTH CAROLINA  
In The Court of Common Pleas

---

APPEAL FROM CITY OF FORT MILL  
MUNICIPAL COURT

Peter Lenzi, Municipal Court Judge

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Case No. 2012-CP-46- 02640

The City of Fort Mill,

Respondent,

v.

Colin Duane Fitzgerald,

Appellant.

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NOTICE OF APPEAL

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July 23, 2012

The Defendant, Colin Duane Fitzgerald, does hereby through his attorney make an Appeal to the Court of Common Pleas of York County for his conviction for the charge of Driving with an unlawful Alcohol Concentration. This Court has Jurisdiction over this matter pursuant to S.C. Code Ann. § 14-25-95 (1976 as Amended) and *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332 (S.C. 2011).

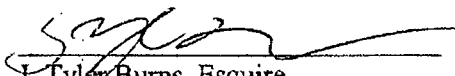
#### ISSUES ON APPEAL

- 1.) The Court erred in not dismissing the case for failure by the Arresting Officer to comply with S.C. Code Ann. § 56-5-2953(B) to provide a sworn affidavit to explain why no video of the incident site could be provided.
- 2.) The Court erred in not dismissing the case for failure of the non-arresting officer comply with S.C. Code Ann. § 56-5-2953(B) to provide a sworn affidavit to explain why no audio was included in his video of the incident cite.
- 3.) The Court erred in not dismissing the case for violation of S.C. Code Ann. § 56-5-2953 in that the video at the incident cite does not show the Appellant being advised of his Miranda warnings.

#### CONCLUSION

Therefore, the Appellant prays this Court reverse his conviction from the Municipal Court.

Respectfully Submitted,

  
J. Tyler Burns, Esquire  
Reeves, Aiken and Hightower, LLP  
Post Office Box 1297  
Fort Mill, South Carolina 29716  
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Facsimile: (803) 548-7050

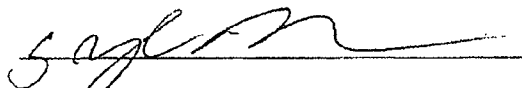
ATTORNEY FOR APPELLANT

July 30, 2012  
Fort Mill, South Carolina

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Certificate of Service

I certify that the above document has been served on Municipal Court and the Agent for the Prosecuting Agency as required in S.C. Code Ann. §18-3-30.



July 30, 2012

DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

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THE STATE OF SOUTH CAROLINA  
In The Court of Common Pleas

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APPEAL FROM CITY OF FORT MILL  
MUNICIPAL COURT

Peter Lenzi, Municipal Court Judge

---

Case No. 2012-CP-46- 02640

---

The City of Fort Mill, Respondent,  
v.  
Colin Duane Fitzgerald Appellant

RETURN OF APPEAL

July 27, 2012

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2012 JUL 30 AM 11:29  
CLERK OF COURT  
C.C.C.P. & G.S.  
FORT MILL, SC

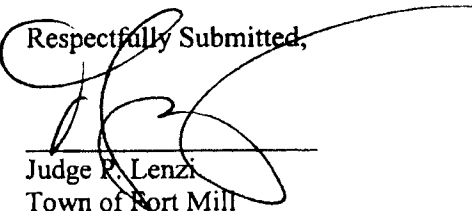
PROCEDURAL STATEMENT OF THE CASE:

This case was called to Jury Trial on April 24, 2012, the defendant was originally charged with DUI 1<sup>st</sup> offense, however the case went to Trial on D.U.A.C. The city was represented by Jenny Desch and the defendant was represented by Tyler Burns. Counsel for the Defense filed pretrial motions for dismissal contending that various violations of 56-5-2953 South Carolina Code of Laws had occurred. These motions were considered by the court and denied.

The case proceeded to trial uneventfully with opening statements, presentation of City case, the City and Defense resting followed by closing arguments and instructions by the Court. Through oversight by the Court, the Jury Foreman was not provided with the appropriate Verdict Forms. The proper forms require the Jury to not only make a determination as to the Defendants guilt or innocence but to make a determination as to the Blood Alcohol Concentration. This matter was brought to the courts attention by Defense Counsel after the Jury had been excused by the Court.

Realizing the mistake the Court announced that it was declaring a Mistrial and the Mistrial was noted on the Verdict Form ( attached exhibit I ). Therefore, contrary to the allegations in the Defense Notice of Appeal there was not conviction of the Defendant and the case has been placed back on the Jury Trial Docket.

Respectfully Submitted,

  
\_\_\_\_\_  
Judge P. Lenzi  
Town of Fort Mill  
Telephone: (803) 547-2022

July 27, 2012  
Fort Mill, South Carolina

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CLERK OF COURT  
C.C.P. & G.S.  
YORK COUNTY, SC

STATE OF SOUTH CAROLINA	)	IN THE MUNICIPAL COURT
	)	
COUNTY OF YORK	)	
	)	
The City of Fort Mill	)	TICKET: 46773FT
	)	
Plaintiff	)	
	)	RETURN TO APPEAL
-vs-	)	
	)	
Colin Duane Fitzgerald	)	
	)	
Defendant	)	

STATEMENT OF FACTS

The facts before the Court are generally not in dispute. On the night of the Defendant's arrest for DUI 1<sup>st</sup> offense, he was originally detained by Sgt. Boone of the York County Sheriff's Department. Sgt. Boone contacted the Fort Mill Police Department and Officer Baird responded to the scene. After speaking to the Defendant and Sgt. Boone, Officer Baird initiated a DUI investigation which included the administration of Field Sobriety Tests and the Defendant was ultimately charged and taken into custody on the charge of DUI 1<sup>st</sup> offense.

In conjunction with these proceedings, Officer Baird submitted an Affidavit providing an explanation for his failure to produce a video-tape of the events which occurred at the road side. It must be noted, however, that notwithstanding Officer Baird's failure to produce a video, Sgt. Boone's in car video captured the events at the road side including, but not limited to, the Field Sobriety Tests as well as the Defendant being advised of his Miranda rights.

LEGAL ARGUMENTS AND ANALYSIS

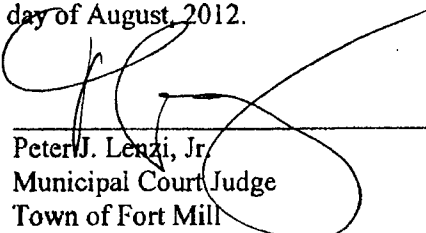
The gravamen of the Defendant's Appeal all center on alleged violations of S.C. Code Ann. 56-5-2953 focusing on the alleged failure by Officer Baird to provide an Affidavit explaining why "no video of the incident site could be provided:" and why "no audio was included in his video of the incident site" and why the incident site video "does not show the Appellant being advised of Miranda warnings."

The Affidavit submitted by Officer Baird together with the videos admitted into evidence are part of the record before this Court. Candidly, this is a case of first impression for the undersigned in that the on site video, offered into evidence was not produced by the Arresting Officer but rather by another Law Enforcement Officer on the scene.

The undersigned ruled on Pre-Trial Motions filed by the defense on literally the same issues now on Appeal to this Court. The pronouncements of the Court of Appeals in *Murphy v. State*, 709 S.E.2d 685 (2011) formulated the basis of this court's denial of Motions to Dismiss filed by the defense. In *Murphy* the Court of Appeals noted that 56-5-2953 provides in part that a person "must have his conduct at the incident site and breath site video taped" and that...the video taping at the incident site must "(a) begin not later than the activation of ... blue lights and conclude after the arrest" "and (b) include the person being advised of his Miranda rights before any Field Sobriety Tests are administered, if the tests are administered."

There is nothing in the Statute that requires the video be produced by the Arresting Officer. According to Judge Thomas in *Murphy*, "the plain language of the Statute is not violated as long as the recording captures (1) the accused's conduct and (2) Miranda warnings prior to Field Sobriety Tests, if such tests occur."

Respectfully submitted this 14<sup>th</sup> day of August, 2012.



---

Peter J. Lenzi, Jr.  
Municipal Court Judge  
Town of Fort Mill

Exhibits: Verdict Form  
Ticket 46773FT

cc: Jenny Desch  
Tyler Burns

STATE OF SOUTH CAROLINA  
UNIFORM TRAFFIC TICKET

62

CITY OR COUNTY OF Fort Mill VERSUS

FIRST NAME Colin MIDDLE NAME Duane LAST NAME Fitzgerald

STREET AND NO 1077 Millhouse Dr CITY Rock Hill STATE SC ZIP CODE 29730

STATE LICENSED SC DRIVER'S LICENSE NO 102294578 CDL  YES  NO DRI LIC CLASS D

VEH LIC NO HNF 907 STATE SC MAKE OF VEH INFI YEAR 08 COMB VEH  HAZ MT  MOPED  MTRCYCL  OTHER

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT

NAME OF TRIAL COURT Lenzi STREET AND NO 111 Academy St.

DATE OF TRIAL 10/19/2011 TIME OF TRIAL 5:00 PM CITY FT Mill STATE SC ZIP CODE 29715

VIOLATION - COURT APPEARANCE REQUIREMENTS  YES  NO VIOLATION SECTION NO 56-5-2930

Driving Under the Influence 1st

OWNER OF VEHICLE Crystal Ann Fitzgerald DATE OF ARREST 10/9/2011

ADDRESS OF OWNER SAME DATE OF VIOLATION 10/9/2011

BAIL DEPOSITED 200 NAME OF ARRESTING OFFICER W. Beard RANK PC

DESCRIPTION OF ACCUSED B/M 5' 7 1/2" 145 lbs 10/21/82 COUNTY York RANK 46

DATE BAIL REC'D 10/19/2011 BY [Signature] BADGE 403 TROOP 4

CASE BEFORE MAGISTRATE  JUDICIAL  JURY  FEDERAL COURT

CIRCUIT COURT  FAMILY COURT  FEDERAL COURT

NAME OF TRIAL COURT IF DIFFERENT FROM ABOVE

DEFENDANT DID NOT APPEAR  APPEARED

NOLLE PROSESS  GUILTY  DISPOSITION Doby's Disposal

FORFEITED BOND  PLED NOLO CONTENDERE

TRIAL BY TRIAL JUDGE  JURY  COUNTY SC 1605 CITY FT Mill

VERDICT OF TRIAL IF ANY GUILTY  NOT GUILTY  DATE OF TRIAL IF ANY 4/24/12

COMMITTED TO 30 997 VEHICLE SEIZED  ARREST AS REPORT OF OFFENSE

OFFENSE CODE 99 B A LEVEL .16

*[Signature]* 7/25/12

46773 FT

DRIVER'S RECORD COPY

499

\$997.00

DOCKET NO

AUG 06 2012

STATE OF SOUTH CAROLINA  
TOWN OF FORT MILL

THE STATE OF SOUTH CAROLINA  
AND  
THE TOWN OF FORT MILL

VS.

Colin D. Fitzgerald  
DEFENDANT

CASE # 46TBFT

OFFENSE	DuAC
JUDGE	Lemmi
TRIAL DATE	4-24-12
VERDICT	Guilty
FOREMAN/LADY	Paula Hanson
SENTENCE/ORDER	Mis Trial

12-2040

**From:** Nancy Butler [mailto:nbutler@comporium.net]  
**Sent:** Thursday, July 19, 2012 8:02 AM  
**To:** Desch, Jenny  
**Cc:** Tyler.rjrlaw@gmail.com  
**Subject:** Fitzgearld

Judge Lenzi will sentence Mr. Fitzgerald at 12:00 Noon today in Rock Hill. His cell phone number is 803-385-8093.

Thank you.

Nancy

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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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, Sally Ellison, certify that I have served the within Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

J. Tyler Burns, Esquire  
Post Office Box 1297  
Fort Mill, South Carolina 29716

I further certify that all parties required by Rule to be served have been served.

This 12<sup>th</sup> day of March, 2014.



---

SALLY ELLISON  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

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, Sally Ellison, certify that I have served the within Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

J. Tyler Burns, Esquire  
Post Office Box 1297  
Fort Mill, South Carolina 29716

I further certify that all parties required by Rule to be served have been served.

This 12<sup>th</sup> day of March, 2014.


*Sally Ellison*

SALLY ELLISON  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

**RECEIVED**  
MAR 12 2014  
SC COURT of Appeals

**CERTIFICATE OF COUNSEL**

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By:   
WILLIAM M. BLITCH, JR.  
Assistant Attorney General  
S.C. Bar Number 15608

Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

ATTORNEYS FOR APPELLANT

March 12, 2014

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MAR 12 2014

**SC Court of Appeals**